(1)

Supreme Court U.S.
FILED

No. 98-__ 98 1311 FEB 16 '99

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT COAL COMPANY, *et al.*,

Petitioners,

vs.

MICHAEL HOLLAND, *et al.*,

Respondents,

and

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. KATSAS
Counsel Of Record
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

ANTHONY J. POLITO
POLITO & SMOCK, P.C.
Four Gateway Center
Pittsburgh, PA 15222
(415) 394-3333

Counsel for Petitioners

83pp

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), established only a "specific result" not binding in any other cases.

2. Whether the separation-of-powers principles established in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), bar retroactive application of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act") to nullify a prior final judgment of a United States district court.

3. Whether the settlors and trustees of the United Mine Workers of America 1992 Benefit Plan, who assess and enforce the Coal Act obligations at issue in this case, are "Officers of the United States" subject to the Appointments Clause of the Constitution.

PARTIES TO THE PROCEEDINGS

Petitioners Robert Coal Company, Cliffs Mining Company, and Cleveland-Cliffs Inc were defendants and appellants below. Respondents Michael T. Holland, Marty D. Hudson, Thomas F. Connors, and Robert T. Wallace, as Trustees of the United Mine Workers of America 1992 Benefit Plan, were plaintiffs and appellees below. Respondent United States of America was an intervenor and appellee below.

Robert Coal Company is a wholly-owned subsidiary of Cliffs Mining Company, which in turn is a wholly-owned subsidiary of Cleveland-Cliffs Inc. The stock of Cleveland-Cliffs Inc is publicly traded.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

PERTINENT PROVISIONS 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 10

I. THE COURT OF APPEALS IMPROPERLY REFUSED TO FOLLOW EASTERN ENTERPRISES . 10

A. In *Eastern Enterprises*, Five Justices Adopted The Same Framework For Assessing The Constitutionality Of Retroactive Statutes Such As The Coal Act 11

B. *Marks* Provides No Support For The Court Of Appeals' Refusal To Follow *Eastern Enterprises* 13

C. The Court of Appeals' Refusal To Follow *Eastern Enterprises* Conflicts With The Views Of The Fourth Circuit And The United States Government 15

II. THE ENFORCEMENT OF RETIREE HEALTH BENEFIT OBLIGATIONS AGAINST ROBERT COAL NULLIFIES A PRIOR FINAL JUDGMENT AND THEREFORE CONFLICTS WITH *PLAUT* 16

A. *Plaut* Categorically Prohibits Legislative Interference With Final Judgments 17

B. The Decisions Below Reduce *Plaut* To An Empty Formality 18

III. THE SETTLORS AND TRUSTEES OF THE 1992 BENEFIT PLAN WERE APPOINTED IN VIOLATION OF THE APPOINTMENTS CLAUSE 20

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Adventure Resources, Inc. v. Holland, 137 F.3d 786 (4th Cir. 1998) 24
Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246 (D.C. Cir. 1998) 8, 9, 10, 13, 15
Blue Diamond Coal Co. v. Shalala, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997) ... 7, 14
Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*
Carbon Fuel Co. v. USX Corp., 100 F.3d 1124 (4th Cir. 1996) 15
In re Chateaugay Corp., 945 F.2d 1205 (2d Cir. 1991) 3, 6
Citibank, N.A. v. Data Lease Financial Corp., 904 F.2d 1498 (11th Cir. 1990) 4
Davon, Inc. v. Shalala, 75 F 3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996) 7, 8, 14
District 17, United Mine Workers of America v. Allied Corp., 735 F.2d 121 (4th Cir. 1984), *vacated on other grounds*, 765 F.2d 412 (4th Cir. 1985), *cert. denied*, 473 U.S. 905 (1985) 2
District 29, United Mine Workers of America v. Royal Coal Co., 768 F.2d 588 (4th Cir. 1985) 2, 13
Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) ..... *passim*
Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) 20
Gregg v. Georgia, 428 U.S. 153 (1976) 14
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 23
Ex Parte Hennen, 38 U.S. (13 Pet.) 225 (1839) 21
Holland v. Keenan Trucking Co., 102 F.3d 736 (4th Cir. 1996) 15

Israel v. Carpenter, 120 F.3d 361 (2nd Cir. 1997) 3
King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) (en banc) 15
LTV Co. v. Shalala (In re Chateaugay Corp.), 53 F.3d 478 (2nd Cir. 1995), *cert denied*, 516 U.S. 913 (1995) 24
In re Leckie Smokeless Coal Co., 99 F.3d 573 (4th Cir. 1996), *cert denied*, 117 S.Ct. 1251 (1997) 24
Marks v. United States, 430 U.S. 188 (1977) 13, 14
Mary Helen Coal Corp. v. Hudson, No. 97-2331 1998 WL 708687 (4th Cir. Sept. 24, 1998) (per curiam) 15
McGlothlin v. Connors, 142 F.R.D. 626 (W.D. Va. 1992) 2, 3, 13
Morrison v. Olson, 487 U.S. 654 (1988) 20, 23
Myers v. United States, 272 U.S. 52 (1926) 21
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 8, 10, 17, 18 19
Ex Parte Siebold, 100 U.S. 371 (1880) 21
Touby v. United States, 500 U.S. 160 (1991) 9
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 12
Weiss v. United States, 510 U.S. 163 (1994) 20
In re West Texas Marketing Corp., 12 F.3d 497 (5th Cir. 1994) 3

Constitutional Provisions and Statutes

U.S. Const. art.II, §2, cl.2 20
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 7
29 U.S.C. § 1132(e) 7
29 U.S.C. § 1451(d) 7
Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722 1
29 U.S.C. § 9701 7

26 U.S.C. § 9702 5
26 U.S.C. § 9703 5
26 U.S.C. § 9704 22
26 U.S.C. § 9706 22
26 U.S.C. § 9712 ..... 5, 6, 7, 16, 22
29 U.S.C. § 9721 ..... 6, 7
106 Stat. 2 776 (1992) 23

Miscellaneous Authorities

J. Davis & W. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59 . 14
Health Benefits for Retired Coal Miners: Hearings Before the Subcomm. on Oversight of Governmental Management Restructuring, and District of Columbia of the Sen. Comm. on Governmental Affairs, 105th Cong., 2d Sess., Statement of Marilyn O'Connell (Oct. 6, 1998) 16
The Supreme Court, 1997 Term—Leading Cases, 112 Harv. L. Rev. 122 (1998) 14

PETITION FOR A WRIT OF CERTIORARI

Robert Coal Company, Cliffs Mining Company, and Cleveland-Cliffs Inc respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is unreported. The opinion of the district court (Pet. App. 4a) is reported at 986 F. Supp. 621 (D.D.C. 1997).

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1998. On January 6, 1999, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 15, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS

The Appointments Clause of the Constitution (Art. II, § 2, cl. 2), the Fifth Amendment of the Constitution, and pertinent provisions of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701-9722, are reproduced in the appendix to this petition. Pet. App. 31a.

STATEMENT OF THE CASE

This case presents Fifth Amendment, separation-of-powers, and Appointments Clause challenges to the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701-9722. The Fifth Amendment question arises because the court of appeals has held that this Court's decision in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), is not binding, and has explicitly refused to follow that decision. The separation-of-powersquestion arises because the Coal Act, as applied to petitioners, effectively nullifies the prior final

judgment of a United States district court. Finally, the Appointments Clause question arises because the Coal Act obligations at issue are assessed and enforced by the settlors and trustees of the United Mine Workers of America 1992 Benefit Plan ("1992 Benefit Plan"), all of whom are appointed directly or indirectly by Congress.

1. Robert Coal's Involvement in the Coal Industry

Between 1974 and 1984, petitioner Robert Coal Company managed two coal mines owned respectively by Leslie Coal Mining Company and McInnes Coal Mining Company. Pet. App. 9a. While operating those mines, Robert Coal signed the 1974, 1978, and 1981 National Bituminous Coal Wage Agreements ("NBCWAs"), a series of collective-bargaining agreements between the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association ("BCOA"). Pet. App. 6a.

Although these agreements promised UMWA retirees a defined package of health benefits, at least five NBCWA provisions explicitly limited that promise to the respective term of each agreement. *First*, Article XX(c) of each NBCWA stated that UMWA retirees would receive health benefits only "'during the term of this Agreement.'" *District 29, United Mine Workers of America v. Royal Coal Co.*, 768 F.2d 588, 590-91 (4th Cir. 1985) (quoting Art. XX(c)). *Second*, Article XX(d) of each NBCWA stated that employer contributions for retiree health benefits would "'en[d] when this Agreement is terminated.'" *District 17, United Mine Workers of America v. Allied Corp.*, 735 F.2d 121, 126 (4th Cir. 1984) (quoting Art. XX(d)), *vacated on other grounds*, 765 F.2d 412 (4th Cir. 1985), *cert. denied*, 473 U.S. 905 (1985). *Third*, Article XX(h) of the NBCWAs stated that full funding of retiree health benefits would be guaranteed only "'during the term of this Agreement.'" *McGlothlin v. Connors*, 142 F.R.D. 626,

631 (W.D. Va. 1992) (quoting Art. XX(h)).[1] *Fourth*, the Suspension Clause of each NBCWA stated that retiree health benefits could be "'suspended or reduced'" after the NBCWA had expired. *Id.* (quoting Suspension Clause). *Fifth*, each NBCWA contained a so-called General Description stating that retiree health benefits were guaranteed only "'during the term of this Agreement.'" *In re Chateaugay Corp.*, 945 F.2d 1205, 1208 (2d Cir. 1991) (quoting General Description).

After satisfying all of its commitments to provide retiree health benefits during the term of the 1974, 1978, and 1981 NBCWAs, Robert Coal completely terminated its involvement in the coal industry. On September 30, 1984, both the 1981 NBCWA and Robert Coal's management contracts expired. Pet. App. 9a. Since that date, Robert Coal has not produced any coal, signed any NBCWA, or employed any worker represented by the UMWA. CADC Jt. App. 104.

2. The Kentucky Final Judgment

In October 1984, the UMWA filed a lawsuit against Robert Coal and others in the United States District Court for the Eastern District of Kentucky. Despite the various contractual limitations set forth above, the UMWA alleged that Robert Coal had continuing obligations, under the NBCWAs, to provide health benefits to retirees. Pet. App. 9a-10a.

On May 27, 1988, the Kentucky court entered a final judgment dismissing the UMWA's lawsuit "with prejudice in its entirety as to all defendants." Pet. App. 40a.[2] The final

---

[1] Article XX(h) appeared in the 1978 and 1981 NBCWAs, but not in the 1974 NBCWA. *See Eastern Enterprises*, 118 S. Ct. at 2140 (plurality opinion).

[2] A stipulated dismissal "with prejudice" constitutes a final judgment on the merits. *See, e.g., Israel v. Carpenter*, 120 F.3d 361, 365 (2nd Cir. 1997); *In Re West Texas Marketing Corp.*, 12 F.3d 497, 500 (5th Cir.

judgment expressly approved and incorporated by reference a settlement agreement between the UMWA and Robert Coal. *Id.* Although the final judgment temporarily revived Robert Coal's obligation to provide health benefits to its UMWA retirees, the final judgment affirmatively extinguished that obligation after January 31, 1993. The final judgment specifically decreed that, after that date, neither Robert Coal nor its corporate parent:

> shall have any obligation or duty to continue or to otherwise provide to any former employee or pensioner of Robert at the former Leslie and McInnes Mines, or to any surviving spouse or dependents of such former employee or pensioner, any health or other non-pension benefits, arising out of any Wage Agreement [*i.e.*, NBCWA], including but not limited to those benefits which Robert is providing pursuant to the terms of this Settlement Agreement.

Pet. App. 44a.

Robert Coal satisfied all of its obligations under the Kentucky final judgment to provide health benefits to its UMWA retirees between May 27, 1988 and January 31, 1993. Pet. App. 10a.

3. The Coal Act

On October 24, 1992, the Coal Act was enacted. The Coal Act created two statutory funds to continue providing health benefits to UMWA retirees: the United Mine Workers of America Combined Benefit Fund ("Combined Fund") and the

---

1994); *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, 1501-02 (11th Cir. 1990).

1992 Benefit Plan.[3] The Coal Act entitles these UMWA retirees and their eligible dependents to continue receiving—for the rest of their lives—"substantially the same" health benefits that they previously had received under the NBCWAs. *See, e.g.*, 26 U.S.C. § 9703(b)(1); *id.* § 9712(c)(1). The benefits are financed by premiums imposed upon former NBCWA signatories.

The 1992 Benefit Plan is administered by settlors and trustees who are not appointed by the President, the courts of law, or the heads of departments. Congress itself permanently appointed the UMWA and the BCOA as settlors of the 1992 Benefit Plan. *Id.* § 9701(b)(2). Congress also conferred upon the UMWA and the BCOA, as settlors, the authority to appoint, remove, and determine the number of trustees. *Id.* § 9712(a)(1).

The Coal Act makes the settlors "responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan." *Id.* Thus, the settlors determine such basic plan design features as appropriate "managed care and cost containment rules." *Id.* § 9712(c)(2). Among other things, the settlors also may consider:

> (A) implementing formulary for drugs and subjecting the prescription program to a rigorous review of appropriate use,
>
> (B) obtaining a unit price discount in exchange for patient volume and preferred provider status . . . ,

---

[3] The Combined Fund provides health benefits to retirees who, as of July 20, 1992, were eligible for and receiving benefits under either of two predecessor plans established by the NBCWAs: the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan. *See* 26 U.S.C. §§ 9702(a)(2), 9703(f). The 1992 Benefit Plan provides health benefits to certain other UMWA retirees who retired on or before September 30, 1994. *See id.* § 9712(b).

> (C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,
>
> (D) utilizing, in the claims payment function 'appropriateness of service' protocols under title XVIII of the Social Security Act if more stringent,
>
> (E) creating mandatory utilization review (UR) procedures . . . ,
>
> (F) selecting the most efficient physicians and state-of-the-art utilization management techniques . . . , and
>
> (G) utilizing a managed care network provider system . . . .

Id. § 9712(c)(3). For each of these plan design issues, the settlors "may," but need not, establish whatever "rules" they deem appropriate. *Id.* § 9712(c)(2).

The trustees wield broad power to determine, assess, and collect monthly premiums from former NBCWA signatories. The trustees determine whether an individual is eligible to receive benefits from the 1992 Benefit Plan, *see id.* § 9712(b)(2), and, if so, what former NBCWA signatory is responsible for financing those benefits, *see id.* § 9712(d)(3). Moreover, the trustees determine what level of premiums, *see id.* § 9712(d)(1), and premium adjustments, *see id.* § 9712(d)(2), are necessary to operate the 1992 Benefit Plan. Finally, the trustees have authority to conduct civil litigation to enforce alleged statutory obligations to the 1992 Benefit Plan. *See id.* § 9721.

4. The Litigation Below

Beginning in February 1993, the trustees of the 1992 Benefit Plan began to provide health benefits to the UMWA retirees formerly employed by Robert Coal. Pet. App. 10a. To pay for these benefits, the trustees purported to assess approximately $20,000 per month in premium payments against Robert Coal and its present corporate parents, petitioners Cliffs Mining Company, Inc. and Cleveland-Cliffs Inc. *Id.* at n.8.[4] The trustees' purported assessments would impose upon petitioners total Coal Act liabilities projected to exceed $8.6 million. Pet. App. 21a.

Exercising their statutory enforcement power, the trustees filed this lawsuit in order to collect the assessed premiums, and the United States intervened on the trustees' behalf. Petitioners challenged the trustees' Coal Act assessments on Fifth Amendment, separation-of-powers, and Appointments Clause grounds. The courts below rejected these constitutional defenses.

a. The district court granted summary judgment to respondents.[5] The court rejected petitioners' claim that the retroactive liability imposed on them by the Coal Act violates the Fifth Amendment Takings and Due Process Clauses. Without the benefit of this Court's decision in *Eastern Enterprises*, which invalidated the Coal Act as applied to a company that ceased mining coal in 1965 (*see* 118 S. Ct. at 2143), the district court relied heavily on the prior inconsistent

---

[4] The Coal Act imposes joint-and-several liability on any "related person" such as a corporate parent. *See, e.g.*, 26 U.S.C. § 9701(c)(2); *id.* § 9712(d)(4). Cliffs Mining and Cleveland-Cliffshave Coal Act liabilities, if at all, only as entities "related" to Robert Coal.

[5] The district court had jurisdiction under 26 U.S.C. § 9721, 28 U.S.C. § 1331, and 29 U.S.C. §§ 1132(e) and 1451(d).

decisions in *Blue Diamond Coal Co. v. Shalala*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997), which had upheld application of the Coal Act to a company that ceased mining coal in 1964 (*see id.* at 520), and *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996), which had upheld application of the Coal Act to a company that ceased mining coal in 1954 (*see id.* at 1119). Pet. App. 19a-24a.

The district court also held that application of the Coal Act to petitioners "does *not* disturb the final judgment" in the Kentucky litigation, and thus does not implicate the separation-of-powers principles established by this Court in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). Pet. App. 15a. The court reasoned that, although the final judgment terminated Robert Coal's "*contractual* obligation" to provide health benefits to its UMWA retirees, the Coal Act later imposed a purportedly distinct "*statutory* obligation" to provide the same benefits to the same retirees. Pet. App. 14a (emphases in original). Nonetheless, the court acknowledged that "the statutory obligations under the Coal Act are similar to *or modeled on* obligations created by earlier collective bargaining agreements." *Id.* (emphasis added).

Finally, the district court held that the settlors and trustees of the 1992 Benefit Plan are not "Officers of the United States," and thus need not be appointed under the Appointments Clause. The court gave two explanations for its conclusion: first, the settlors and trustees have no "continuing employment relationship with the United States government"; and, second, although the settlors and trustees concededly "exercise 'significant authority,'" they "do not exercise significant *governmental* authority" because they "act only to further the private interests of the Plan beneficiaries." Pet. App. 25a (emphasis in original).

b. The court of appeals affirmed "substantially for the reasons stated in the district court's memorandum opinion." Pet. App. 1a. The court of appeals offered no independent analysis of either the separation-of-powers or the Appointments Clause questions. With respect to the Fifth Amendment question, the court cited its own prior decision in *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) ("*ABC*"), as "further support for the district court's holding." Pet. App. 2a. In *ABC*, the court of appeals had rejected a Due Process challenge to the Coal Act on the ground that "the only binding aspect of *Eastern Enterprises* is its specific result—holding the Coal Act unconstitutional as applied to Eastern Enterprises." 156 F.3d at 1255. Despite that holding, the court of appeals rejected petitioners' Takings Clause challenge based on positions advocated by the *concurring and dissenting* Justices in *Eastern Enterprises*. Pet. App. 3a ("[F]ive justices determined that the Takings Clause was not the proper paradigm for analyzing the [Coal] Act's retroactive effects on coal operators.").[6]

---

[6] The court of appeals declined to consider any constitutional argument based on the "non-delegation doctrine." Pet. App. 2a. The court correctly concluded that petitioners had not raised (and did not wish to pursue) that argument. In their brief to the court of appeals, petitioners never argued that the Coal Act was so vague as to constitute an impermissible delegation of legislative power. *Cf. Touby v. United States*, 500 U.S. 160, 164-67 (1991) (describing non-delegation doctrine). Instead, petitioners argued at length that the Coal Act impermissibly delegated administrative power to "Officer[s] of the United States" not properly appointed under the Appointments Clause. *See, e.g.*, Brief of Appellants at 37, *Holland v. Robert Coal Co.*, D.C. Cir. No. 97-5352 (argument heading titled "The Coal Act Is Unconstitutional On Its Face Because It Violates The Appointments Clause"); *id.* at 45 ("the Coal Act is unconstitutional because it violates and circumvents the president's Appointments Power.").

REASONS FOR GRANTING THE WRIT

The decisions below directly conflict with no fewer than three of this Court's landmark constitutional decisions: *Eastern Enterprises*, *Plaut*, and *Buckley v. Valeo*, 424 U.S. 1 (1976). The conflict with *Eastern Enterprises* is most obvious, for the court of appeals would reduce that decision to a "specific result" in a single case. *See ABC*, 156 F.3d at 1255. Moreover, the decisions below would permit Congress, merely by manipulating the labels attached to retroactive statutes, to evade *Plaut*'s "categorical" ban on "legislated invalidation of judicial judgments" (514 U.S. at 228). Finally, the decisions below would permit Congress readily to avoid the previously settled principle, announced by this Court in *Buckley*, that "*any* appointee exercising significant authority pursuant to the laws of the United States" is subject to the Appointments Clause. (424 U.S. at 126 (emphasis added)). This Court should grant review to prevent these decisions—and the important constitutional principles underlying them—from being so eviscerated.

I. THE COURT OF APPEALS IMPROPERLY REFUSED TO FOLLOW *EASTERN ENTERPRISES*

In rejecting petitioners' Fifth Amendment challenges to the Coal Act, the court of appeals adopted two remarkable holdings that together turn *Eastern Enterprises* on its head. First, applying its prior decision in *ABC*, the court of appeals held that the lower courts are *not* bound by the points of agreement between the *Eastern Enterprises* plurality and concurrence. Then, the court of appeals held that the lower courts *are* bound by the points of agreement between the *Eastern Enterprises* concurrence and dissent. The first holding reduces *Eastern*'s protection against retroactive legislation to nothing more than, in the court of appeals' own words, a "specific result" in a single case. *ABC*, 156 F.3d at 1255. And the second holding transforms *Eastern Enterprises* from a

decision that provided *greater* protection against retroactive legislation, as five Justices plainly intended, into one that provides substantially *lesser* protection. This Court should grant certiorari to restore *Eastern Enterprises* or, alternatively, to clarify the proper scope of that decision.

A. In *Eastern Enterprises*, Five Justices Adopted The Same Framework For Assessing The Constitutionality Of Retroactive Statutes Such As The Coal Act

In *Eastern Enterprises*, this Court established a general framework for assessing the constitutionality of retroactive statutes such as the Coal Act. In two separate opinions, five Justices endorsed the same legal test for assessing whether an employee benefits funding statute is impermissibly retroactive. Applying that test, the same five Justices invalidated the Coal Act as applied in that case. These five Justices disagreed only about a theoretical question whether the controlling Fifth Amendment retroactivity principles, about which they were in complete agreement, should be deemed to arise out of the Takings Clause or out of the Due Process Clause.

A plurality of four Justices linked the controlling retroactivity principles to the Takings Clause. Speaking through Justice O'Connor, the plurality concluded that if a statute:

> [1] singles out certain employers to bear a burden that is substantial in amount, [2] based on the employers' conduct far in the past, and [3] unrelated to any commitment that the employers made [4] or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause.

118 S. Ct. at 2153. Applying that test, the plurality concluded that the Coal Act effected a taking (1) because it imposed on Eastern a "considerable" liability, *id.* at 2149; (2) because that liability arose out of employment relationships concluded long

before the Coal Act was enacted, *id.* at 2150; (3) because Eastern had made no "agreement—implicit or otherwise" to provide retiree health benefits beyond the terms of the NBCWAs to which it was signatory, *id.* at 2152; and (4) because Eastern did not cause its employees' generalized need for health benefits, *id.* at 2152-53. In addressing the possible justifications for imposing a significant retroactive liability, the plurality explained that the absence of past employer promises distinguished prior decisions which had upheld the withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act ("MPPAA"). *See id.* at 2152. Similarly, the plurality explained that the absence of any causal connection between past employment and the retirees' current need for generalized health benefits distinguished *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), which had upheld the imposition of retroactive liability for black lung disease caused by past employment in coal mines. *See* 118 S. Ct. at 2152-53. The lynchpin of the plurality's analysis was that "[r]etroactivity is generally disfavored in the law." *Id.* at 2151.

Concurring in the judgment, Justice Kennedy concluded that the considerations identified by the plurality establish a violation of Due Process. Justice Kennedy stressed that he relied on the same "primary retroactivity precedents" as the plurality, *id.* at 2158, and that his analysis was "in full accord with many of the plurality's conclusions," *id.* at 2154. He agreed with the plurality that the Coal Act "imposes a staggering financial burden," *id.* at 2154, and "has a retroactive effect of unprecedented scope," *id.* at 2159. He concluded that "[t]he plurality opinion demonstrates in convincing fashion" the absence of any justification for the imposition of retroactive Coal Act liability. *Id.* He specifically agreed with the plurality that the absence of any past injuries caused or promises made by former NBCWA signatories distinguished prior decisions upholding retroactive employer liability in

Turner Elkhorn and in the MPPAA cases. *Id.* Like the plurality, Justice Kennedy stressed that "our law has harbored a singular distrust of retroactive statutes." *Id.* at 2158.[7]

B. *Marks* Provides No Support For The Court Of Appeals' Refusal To Follow *Eastern Enterprises*

To justify its refusal to follow *Eastern Enterprises*, the decision below relied on *ABC* (Pet. App. 2a), which in turn purported to rely on this Court's decision in *Marks v. United States*, 430 U.S. 188 (1977).[8] Far from justifying the court of appeals' refusal to follow *Eastern Enterprises*, however, *Marks* confirms that that refusal was improper.

---

[7] Under these controlling retroactivity principles, the Coal act is plainly unconstitutional as applied in this case. *First*, petitioners' $8.6 million Coal Act liability is obviously "substantial in amount." 118 S. Ct. at 2153. *Second*, that liability arises out of conduct "far in the past" (*id.*)—Robert Coal's signature of three NBCWAs over a decade before the Coal Act was enacted. *Third*, because the NBCWAs signed by Robert Coal promised benefits only during the term of each agreement, *see, e.g. Royal Coal Co.*, 768 F.2d at 590-91, *McGlothlin*, 142 F.R.D. at 631, petitioners' perpetual Coal Act liabilities are obviously "unrelated to" past employer promises. 118 S. Ct. at 2153. *Fourth*, Robert Coal, like Eastern Enterprises, did not cause its former employees' current need for generalized health benefits. *See id.*

[8] In *ABC*, the court of appeals was quite candid about its refusal to follow this Court's decision in *Eastern Enterprises*. The court squarely held that "the only binding aspect of *Eastern Enterprises* is its specific result—holding the Coal Act unconstitutional as applied to Eastern Enterprises." 156 F.3d at 1255. The court concluded that its "basic inquiry" for resolving Coal Act challenges "remains the same after *Eastern Enterprises* as it was before." *Id.* Thus, in rejecting a Due Process challenge to the Coal Act in *ABC*, the court of appeals cited as persuasive authority several lower-court decisions upholding the Act prior to this Court's decision in *Eastern Enterprises*, including even the reversed First Circuit decision in *Eastern Enterprises* itself. *See id.*

In *Marks*, this Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" 430 U.S. at 193, quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976). *Marks* thus provides for a binding holding even where, because one of the competing opinions is "narrower" than the other, no five Justices agreed on the controlling legal principles. *A fortiori*, there must also be a binding holding where, as in *Eastern Enterprises*, five Justices "*agreed* on legal principles despite their dispute over doctrinal categorization." *The Supreme Court, 1997 Term—Leading Cases*, 112 Harv. L. Rev. 122, 219 (1998) (emphasis added). In these circumstances, the common legal principles are themselves the "common denominator" between the competing opinions, and the lower courts can readily apply those principles even absent agreement about their "precise theoretical underpinnings." *See* J. Davis & W. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 Duke L.J. 59, 72.[9]

The court of appeals further misapplied *Marks* in rejecting petitioners' Takings Clause challenge on the ground that the concurring and dissenting Justices in *Eastern Enterprises* "determined that the Takings Clause was not the proper paradigm for analyzing the Act's retroactive effects on coal operators." Pet. App. 3a. To begin with, because *Marks* applies to positions taken by Justices "'who concurred in the judgments'"

---

[9] The court of appeals' invocation of "the reasons stated in the district court's memorandum opinion" (Pet. App. 1a-2a) provides no independent justification for its refusal to follow *Eastern Enterprises*. The district court opinion was rendered prior to this Court's decision in *Eastern Enterprises*, and the cases relied upon by the district court are flatly inconsistent with this Court's decision. *See, e.g., Blue Diamond*, 79 F.3d at 521-26; *Davon*, 75 F.3d at 1121-30; *see also Eastern Enterprises*, 118 S. Ct. at 2144 & n.4.

(*Marks*, 430 U.S. at 193), dissents cannot contribute to a *Marks* majority, as the court of appeals itself has recognized. *See King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("we do not think we are free to combine a dissent with a concurrence to form a *Marks* majority"). Moreover, having already held itself not bound by the points of agreement between the *Eastern Enterprises* plurality and concurrence, the court of appeals could hardly *then* hold itself bound by the points of agreement between the *Eastern Enterprises* concurrence and dissent. That position reflects not a plausible or even coherent approach to *Marks*, but a rank hostility to *Eastern Enterprises* itself. The Court should grant review to prevent such apparent flouting of its authority.

C. The Court of Appeals' Refusal To Follow *Eastern Enterprises* Conflicts With The Views Of The Fourth Circuit And The United States Government

Not surprisingly, the court of appeals' treatment of *Eastern Enterprises* as nothing more than a "specific result" in a single case (*ABC*, 156 F.3d at 1255) conflicts with the views of not only another court of appeals, but also the United States itself.

In *Mary Helen Coal Corp. v. Hudson*, No. 97-2331, 1998 WL 708687 (4th Cir. Sept. 24, 1998) (per curiam), the Fourth Circuit struck down the Coal Act in a case "materially indistinguishable" from *Eastern Enterprises*, on the ground that, "in *Eastern*. . . five Justices agreed that the Coal Act was uncon-stitutional as applied." *Id.* at *1. Indeed, the Fourth Circuit viewed the binding nature of *Eastern Enterprises* as so clear that it chose not even to publish its own opinion—despite the existence of prior contrary circuit precedent, *see Holland v. Keenan Trucking Co.*, 102 F.3d 736, 739-42 (4th Cir. 1996); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1137-39 (4th Cir. 1996). By applying *Eastern Enterprises* in another case, the Fourth Circuit squarely rejected the D.C. Circuit's conclu-

sion that *Eastern Enterprises* established only a "specific result" in a single case.

The decision below also conflicts with the views of the Social Security Administration ("SSA"), which administers the statutorily-created Combined Fund. After this Court's deci-sion in *Eastern Enterprises*, the SSA concluded that that decision was a binding precedent requiring the revocation of assignments to at least 124 companies "that were in a situation similar to Eastern's as described in the Supreme Court decision." *Health Benefits for Retired Coal Miners: Hearings Before the Subcomm. on Oversight of Government Management, Restructuring, and District of Columbia of the Senate Comm. on Governmental Affairs,* 105th Cong., 2d Sess., Statement of Marilyn O'Connell at 5 (Oct. 6, 1998). This Court should grant certiorari to resolve these conflicts regarding the proper scope of *Eastern Enterprises*.

II. THE ENFORCEMENT OF RETIREE HEALTH BENEFIT OBLIGATIONS AGAINST ROBERT COAL NULLIFIES A PRIOR FINAL JUDGMENT AND THEREFORE CONFLICTS WITH *PLAUT*

Before the Coal Act was enacted, a final judgment had conclusively established that, under the expired 1974, 1978, and 1981 NBCWAs, Robert Coal's contractual obligation to provide health benefits to its UMWA retirees would terminate on January 31, 1993. Pet. App. 43a. Under the Coal Act, however, Robert Coal became obligated to continue providing — *after* that date — the same benefits to the same retirees for the rest of their lives. 26 U.S.C. § 9712(c)(1). Indeed, as the courts below recognized, the later statutory obligation was

expressly "modeled on" the earlier contractual one. Pet. App. 14a.[10]

Even though the Kentucky final judgment and the Coal Act rest on diametrically opposed interpretations of the expired NBCWAs, and even though application of the Coal Act to Robert Coal would nullify the Kentucky final judgment, the decisions below held that this application created no separation-of-powers violation. The decisions below conflict with, and threaten to eviscerate, this Court's decision in *Plaut*.

A. *Plaut* Categorically Prohibits Legislative Interference With Final Judgments

In *Plaut*, this Court held that Congress cannot "retroactively comman[d] the federal courts to reopen final judgments." 514 U.S. at 219. The Court reasoned that such a command impermissibly interferes with the judicial power "not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Id.* at 218-19. The Court concluded that Congress cannot subject a final judgment "to a reopening requirement which did not exist when the judgment was pronounced." *Id.* at 234; *see also id.* at 228 (Constitution prohibits "legislative interference" with final judgments).

Plaut repeatedly stressed that this prohibition is "categorical." *Id.* at 240. Thus, it applies "when an individual final judgment is legislatively rescinded for even the *very best* of reasons." *Id.* at 228. It applies when Congress acts pursuant

---

[10] The purported justification for the Coal Act was that the NBCWAs themselves, beginning in the 1940s and 1950s, had promised lifetime health benefits to UMWA retirees. *See Eastern Enterprises*, 118 S. Ct. at 2141. In *Eastern Enterprises*, this Court rejected that justification as inconsistent with the terms of those contracts. *See id.* at 2152 (plurality); *id.* at 2159 (concurrence).

to a "general statute," which may reduce a perception of "individual favoritism," but "is legislative interference with judicial judgments nonetheless." *Id.* And, most importantly here, it applies regardless of the kind or source of the legal rule applied to produce the judgment at issue. *See id.* at 230 ("The issue here is not the validity or even the source of the legal rule that produced the Article III judgments, but rather the immunity from legislative abrogation of those judgments themselves.").

The Court explained that these categorical principles serve fundamental separation-of-powers objectives:

> [T]he doctrine of separation of powers is a structural safeguard rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features (of which the conclusiveness of judicial judgments is assuredly one) it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Id. at 239. By permitting application of the Coal Act to nullify the Kentucky final judgment, the decisions below fail to enforce the "categorical" prohibition against "legislated invalidation of judicial judgments" (*id.* at 240), and thus threaten the critical "structural safeguard" (*id.* at 239) established by this court in *Plaut*.

B. The Decisions Below Reduce *Plaut* To An Empty Formality

The decisions below not only conflict with *Plaut*, but also threaten to render it a dead letter. The lower courts purported to distinguish *Plaut* on the ground that the Coal Act imposes a "new" statutory obligation, albeit one "modeled on" the old contractual obligations. Pet. App. 14a. Under that reasoning, although Congress could not direct the courts to reopen final

judgments that claims under Rule 10b-5 are time-barred, *see Plaut*, 514 U.S. at 213-15, Congress could accomplish the same result by creating a "new" statutory claim "modeled on" Rule 10b-5, by attaching a longer limitations period to that claim, and by commanding the statute to be applied retroactively even to cases finally adjudicated under Rule 10b-5. Similarly, although Congress could not direct the courts to reopen final judgments that NBCWA contractual commitments are temporally limited, Congress could accomplish the same result, as it did here, by creating a "new" statutory liability "modeled on" the NBCWAs, by making that liability temporally unlimited, and by commanding the statute to be applied retroactively even to cases finally adjudicated under the NBCWAs. In other words, the decisions below permit Congress, merely by changing the form of its enactments, to drain *Plaut* of all substantive significance.

Alternatively, the lower courts held that *Plaut* was inapplicable because the Kentucky final judgment arose out of "private contractual disputes." Pet. App. 16a. That position is even more untenable, for *Plaut* itself made clear that the separation-of-powers issue does not turn on "the validity or even the source of the legal rule that produced the Article III judgments," but on "the immunity from legislative abrogation of those judgments themselves." 514 U.S. at 230. Indeed, the contract-based nature of the Kentucky final judgment only strengthens the separation-of-powers claim presented in this case. As this Court explained in *Plaut*:

> "[An] act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby . . . . This, as a general proposition, is certainly not to be denied, *especially as it respects adjudication upon the private rights of parties*. When they have passed into judgment the right become absolute, and it is the duty of the court to enforce it."

514 U.S. at 226 (emphasis added).

The Court should grant certiorari because the decisions below plainly conflict with, and indeed threaten to eviscerate, this Court's landmark separation-of-powers decision in *Plaut*.

III. THE SETTLORS AND TRUSTEES OF THE 1992 BENEFIT PLAN WERE APPOINTED IN VIOLATION OF THE APPOINTMENTS CLAUSE

This Court should grant review to determine whether the settlors and trustees of the 1992 Benefit Plan are "Officers of the United States" within the meaning of the Appointments Clause of the Constitution.[11] It is undisputed that all such "Officers" must be appointed under the procedures specified in the Appointments Clause, *see Buckley*, 424 U.S. at 125-26, and that neither the settlors nor the trustees of the 1992 Benefit Plan were so appointed. In holding that the settlors and trustees of the 1992 Benefit Plan are not "Officers of the United States," the decision below conflicts with the definition of that term set forth in *Buckley* and its progeny.

In *Buckley*, this Court held that "*any* appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'" subject to the Appointments Clause. 424 U.S. at 126 (emphasis added). The Court repeatedly has reaffirmed that principle. *See, e.g., Weiss v. United States*, 510 U.S. 163, 169 (1994) ("military judges, because of the authority and responsibilities they possess, act

---

[11] The Appointments Clause (U.S. Const. art. II, § 2, cl. 2) provides:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

as 'Officers' of the United States"); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 880-82 (1991) (special trial judges are "Officers" because their positions, functions and duties "are specified by statute"); *Morrison v. Olson*, 487 U.S. 654, 671-72 & n.12 (1988) (independent counsel was an "Officer" even though her "office is limited in tenure"). Prior to *Buckley* as well, the Court had broadly construed the term "Officers of the United States" to include such relatively minor functionaries as a postmaster, *see Myers v. United States*, 272 U.S., 52, 173-74 (1926); an election supervisor, *see Ex Parte Siebold*, 100 U.S. 371, 397-98 (1880); and a district court clerk, *see Ex Parte Hennen*, 38 U.S. (13 Pet.) 225, 228 (1839).

In *Buckley*, this Court invalidated substantial portions of the Federal Election Campaign Act of 1971, which had created and conferred substantial authority on the Federal Election Commission. Although the Court permitted the Commission to perform recordkeeping and investigatory functions "relating to the flow of necessary information," it held that only properly appointed "Officers of the United States" could exercise rulemaking or adjudicatory powers necessary for "fleshing out the statute," and that only such "Officers" could exercise enforcement powers "necessary to ensure compliance with the statute and rules." 424 U.S. at 137. The Court was particularly emphatic with respect to the power to conduct civil enforcement litigation:

> But when we go beyond this type of [recordkeeping and investigatory] authority to the more substantial powers exercised by the Commission, we reach a different result. *The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief*, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress. A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the

> responsibility to "take Care that the Laws be faithfully executed."

Id. at 138 (emphasis added).

In holding that the settlors and trustees of the 1992 Benefit Plan are not "Officers of the United States" subject to the Appointments Clause, the decisions below patently conflict with these principles. As explained above, the settlors and trustees of the 1992 Benefit Plan exercise substantial authority to "fles[h] out" the Coal Act: in determining fundamental design features of the 1992 Benefit Plan (26 U.S.C. § 9712(c)(2) & (3)); in determining who is eligible to receive benefits from the 1992 Benefit Plan (*id.* § 9712(b)(2)); in determining who should pay for those benefits (*id.* § 9712(d)(3)); and in determining what premiums are necessary to provide those benefits (*id.* § 9712(d)(1) & (2)).[12] Moreover, the trustees enjoy the sole authority—"exemplified by its discretionary power to seek judicial relief" (424 U.S. at 138)—to enforce the statutory liabilities created under § 9712. Because the settlors and trustees exercise "significant authority pursuant to the laws of the United States," they are "Officers of the United States" for Appointments Clause purposes. *See Buckley*, 424 U.S. at 126.

The courts below erroneously held that "[t]he definition of an 'officer' requires . . . a continuing and formalized relationship of employment with the United States government." Pet. App. 28a. That sweeping holding would permit Congress to bypass the Appointments Clause by assigning *any* amount of executive or administrative authority to temporary federal agents, to state officials, or to private parties. It is inconsistent

---

[12] In contrast, Combined Fund premiums are fixed by the Commissioner of Social Security, who is appointed by the President. *See, e.g.*, 26 U.S.C. § 9704(b)(2); *id.* § 9706.

not only with *Buckley*, which held that "*any* appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,'" *see*, 424 U.S. at 126 (emphasis added), but also with *Morrison v. Olson*, which held that an independent counsel is an "officer of the United States" notwithstanding his or her "limited . . . tenure" (487 U.S. at 671-72).[13]

Alternatively, the courts below reasoned that the trustees "exercise no *governmental* authority of any kind," because they "serve only the interests of the Plan beneficiaries, not the federal government or even the public- at-large." Pet. App. 25a (emphasis added). That sweeping holding would permit Congress to bypass the Appointments Clause by assigning *any* amount of executive or administrative authority to officials with responsibility for only a narrow class of intended beneficiaries or regulated parties. It too is inconsistent with *Buckley*'s holding that "*any* appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'" 424 U.S. at 126 (emphasis added).[14]

---

[13] Indeed, *Buckley* defined "employee" status as an alternative to—not a requirement for—"Officer" status under the Appointments Clause:

> [T]here is no claim made that the Commissioners are employees of the United States rather than officers. Employees are lesser functionaries subordinate to officers of the United States, whereas the Commissioners, appointed for a statutory term, are not subject to the control or direction of any other executive, judicial, or legislative authority.

Id. at 126 n.162 (citations omitted); *accord, e.g.*, *Morrison*, 487 U.S. at 671 n.12 ("It is clear that appellant is an 'officer' of the United States, not an 'employee.'").

[14] The lower courts' analysis also ignores the stated justification of the Coal Act itself — "to secure the stability of interstate commerce." *See* 106 Stat. 2776, 3037 (1992) (congressional findings). Indeed, if the Coal Act simply compelled private wealth transfers without any public purpose, it

The determination whether a power is "governmental" depends on the nature of the power, not the number of individuals subject to it. For example, several courts have held that Coal Act premiums are taxes. *See e.g., In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (4th Cir. 1996), *cert denied*, 117 S.Ct. 1251 (1997); *LTV Co. v. Shalala* 53 F.3d 478 (2nd Cir. 1995), *cert denied*, 516 U.S. 913 (1995); *Adventure Resources, Inc. v. Holland*, 137 F.3d 786 (4th Cir. 1998). It is difficult to imagine any power more inherently "governmental" than the assessment and enforcement of federal taxes, no matter how narrow the class of affected taxpayers or intended beneficiaries.

The Court should grant certiorari because the decisions below conflict with *Buckley* and because the rationale of the decisions below, which create broad Appointments Clause exceptions whenever the putative "Officer" is not formally employed by the federal government, or whenever the putative "Officer" exercises coercive power on behalf of a narrow class of beneficiaries, would eviscerate settled Appointments Clause jurisprudence.

---

would be independently unconstitutional under the "public use" requirement of the Fifth Amendment. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

GREGORY G. KATSAS
Counsel of Record
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

ANTHONY J. POLITO
POLITO & SMOCK, P.C.
Four Gateway Center
Pittsburgh, PA 15222
(412) 394-3333

Counsel for Petitioners

February 1999

APPENDIX

[Filed Oct. 16, 1998]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-5352 September Term, 1998

Michael Holland, *et al.*, Civil Action No. 93-2608
Appellees

v.

Robert Coal Company, *et al.*,
Appellants

United States of America,
Appellee

On Appeal from the United States District Court
for the District of Columbia

Before: HENDERSON, RANDOLPH, and TATEL, *Circuit Judges*.

JUDGMENT

This case was heard on the record from the United States District Court for the District of Columbia and on the briefs and arguments by counsel. The court has accorded the arguments full consideration and has determined the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 36(b). Accordingly, it is

ORDERED that the judgment from which this appeal has been taken be affirmed substantially for the reasons stated in the district court's memorandum opinion of November 17, 1997.

See Holland v. Robert Coal Co., 986 F.Supp. 621 (D.D.C. 1997). We note that our recent decision in *Association of Bituminous Contractors, Inc. v. Apfel*, 1998 WL 637024 (D.C. Cir. Sept. 18, 1998), wherein we upheld the "Combined Fund" portion of the 1992 Coal Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, against a due process challenge, provides further support for the district court's holding. In *Bituminous Contractors*, we held that the structure of the Combined Fund constituted a rational legislative scheme to ensure that the cost of providing health benefits be placed on the operators that had created the expectation of those benefits. *See* 1998 WL 637024, at 10-11.

We find no constitutionally significant difference between the Combined Fund and the 1992 Benefit Plan. Both the Combined Fund and the 1992 Benefit Plan are within the same act, *see* 26 U.S.C. § 9701, and were developed as part of the Congress's comprehensive scheme to resolve a crisis in the funding of coal miner retiree benefits. In addition, the funding apportionment among employers is similar in both funds in that both use some degree of proportionality in determining employers' funding obligations. *Compare* 26 U.S.C § 9703(b) (Combined Fund) *with id.* § 9712(d)(1) (1992 Benefit Plan).

Robert Coal also argues that the trustees of the 1992 Benefit Plan are essentially tax assessors and currently exercise their functions in violation of the Appointments Clause. Whatever the merits of characterizing the benefit premiums as federal taxes, we believe the core of Robert Coal's complaint, as elaborated at oral argument, is that the Congress cannot delegate its taxing power to a private entity. Because the parties did not raise or argue the non-delegation doctrine in this appeal, however, we refrain from deciding the issue.

Finally, we explicitly reject Robert Coal's Taking Clause challenge. In *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998), five justices determined that the Takings Clause was not the proper paradigm for analyzing the Act's retroactive effects on coal operators. *See* 118 S.Ct. at 2155-58 (Kennedy, J., concurring in judgment and dissenting in part), *id.* 2161-64 (Stevens, J., dissenting).

The clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a)(1).

Per Curiam
FOR THE COURT:
/s/ Mark J. Langer
Mark J. Langer, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MICHAEL H. HOLLAND, *et al.*, as Trustees of the United Mine Workers of America 1992 Benefit Plan, Plaintiffs,	:	
and	:	
UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, Intervenor,	:	Civil Action No. 93-2608 (GK)
v.	:	
ROBERT COAL COMPANY, *et al.*, Defendants.	:	

MEMORANDUM OPINION

KESSLER, District Judge.

Plaintiffs Trustees of the United Mine Workers of America 1992 Benefit Plan ("1992 Plan") bring this action to recover premium payments allegedly owed by Defendants to the 1992 Plan under the Coal Industry Retiree Health Benefits Act of 1992 ("Coal Act"), 26 U.S.C. §§ 9701, *et seq.* (1989 & Supp.

1997).[1] The Coal Act requires coal operators to contribute to the 1992 Plan to provide health coverage to retired workers.

Defendants contend that the Coal Act does not apply to them or, in the alternative, that it is unconstitutional. (Defs.' Mem. Summ. J. at 10.) They argue that the settlement of a 1988 civil action[2] between Defendants and the United Mine Workers of America ("UMWA") extinguished their liability to the 1992 Plan.

This matter is before the Court on Parties' Cross-Motions for Summary Judgment [#36, #38]. Upon consideration of the Motions, Oppositions, Replies, Memorandum of Intervenor United States in Opposition to Defendants' Motion, the numerous supplemental pleadings filed by the parties, and the entire record herein, for the reasons discussed below, Plaintiffs' Motion for Summary Judgment is hereby **granted**, and Defendants' Motion for Summary Judgment is hereby **denied**.

---

[1] The Coal Act was enacted as sections 19141 to 19143 of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56. Its primary provisions are codified in the Internal Revenue Code, 26 U.S.C. § 9701-9722. For ease of reference, the Court will cite the codifications in the Internal Revenue Code by Code section numbers.

[2] *United Mine Workers of America v. Pickands Mather & Co., et al.*, Civil Action No. 84-338 (1988), in the United States District Court for the Eastern District of Kentucky ("Kentucky lawsuit").

I. *Background* [3]

A. The Coal Act

The Coal Act's history has been well-documented by other courts. *See, e.g., Eastern Enterprises v. Chater*, 110 F.3d 150, 152-154 (1st Cir. 1997); *In re Blue Diamond Coal Co.*, 79 F.3d 516, 518-520 (6th Cir. 1996); and *In re Chateaugay Corp.*, 53 F.3d 478, 491 (2d Cir. 1995). This Court will thus only briefly summarize those facts it deems necessary to an understanding of this case.

Miners have received benefits since 1946 under a series of collective bargaining agreements between UMWA and a group of coal producers, the Bituminous Coal Operators' Association, Inc. ("BCOA"). In these National Bituminous Coal Wage Agreements ("NBCWAs"), the signatory coal producers agreed to contribute to various funds in order to provide miners and their families different types of benefits. Robert Coal Company ("Robert Coal") was a signatory to the 1974, 1978, and 1981 agreements.

Courts have concluded that the language of the NBCWAs, beginning with the NBCWA of 1974, provided that pensioners would be entitled to health services for life.[4] The 1978

---

[3] Pursuant to Local Rule 108(h), "[i]n determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion." The Court thus recites facts from the Parties' Statements of Material Facts Not in Dispute and their Stipulation of Facts.

[4] *See, e.g., District 29, United Mine Workers of Am. v. United Mine Workers of Am. 1974 Benefit Plan & Trust*, 826 F.2d 280, 283 (4th Cir. 1987), *cert denied*, 485 U.S. 935 (1988); *United Mine Workers of Am. v. Nobel*, 720 F.Supp. 1169, 1178 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). Robert Coal argues that its retired employees, however, had no rational basis for

NBCWA, as well as all subsequent NBCWAs required signatory operators to perpetually contribute to the trusts created by those agreements. These provisions called "evergreen clauses", required each signatory operator to continue making contributions to the trusts at the amount specified in future NBCWAs, regardless of whether the operator signed the future NBCWA.[5]

The funds that provided such benefits became financially unstable in the mid- and late-1980s. As coal operators terminated their participation in the trusts and health care costs escalated, the trusts experienced a financial crisis that threatened their continued existence. This crisis threatened to disrupt coal production and interstate commerce, cripple the economies of several coal-producing states, and deprive over 100,000 retired miners and their dependents of promised health benefits. To remedy the shortfall in funding, Congress enacted the Coal Act of 1992.

The Coal Act consolidated the existing funds and created the UMWA Combined Benefit Fund ("Combined Benefit Fund"). 26 U.S.C. § 9702. The Combined Fund provides health benefits to beneficiaries who, as of July 1992, were receiving benefits from the earlier trusts. *Id.* at § 9702(a).

The Coal Act also created a second fund, the 1992 UMWA Benefit Plan. *Id.* at § 9712. That Plan (whose Trustees are the Plaintiffs in this action) provides health benefits to people who should receive coverage under an individual employer plan but do not. *Id.* at § 9712(b)(2)(B). Beneficiaries are assigned, or attributed, to the coal mine operator that most recently employed them and was a signatory to the NBCWAs of 1978

---

expecting lifetime health benefits. (Defs.' Mem. Summ. J. at 38.)

[5] *See, e.g., United Mine Workers of Am. 1974 Pension v. Pittston Co.*, 984 F.2d 469, 471-72 (D.C. Cir. 1993), *cert. denied*, 509 U.S. 924 (1993).

or later. 26 U.S.C. § 9706(a)(2). Premium payments for beneficiaries of the 1992 UMWA Benefit Plan are the responsibility of the beneficiaries' most recent signatory employers. *Id.* at § 9712(d).

It is Robert Coal's alleged responsibility for making payments to the 1992 UMWA Benefit Plan that is at issue in the instant action.

B. The Current Dispute

Defendants Robert Coal and Cliffs Mining Company ("Cliffs Mining") are wholly-owned subsidiaries of Defendant Cleveland-Cliffs, Inc. ("Cleveland-Cliffs"). The three Defendants are "related persons" within the meaning of section 9701(c) of the Coal Act, 26 U.S.C. § 9701(c).[6]

The 1992 Plan has assigned a number of Plan-beneficiaries to Robert Coal. Plaintiffs assert that Defendants are liable to the 1992 Plan for the payment of monthly premiums for each beneficiary who is receiving health benefits from the 1992 Plan and who is "attributable" to Robert Coal under 26 U.S.C. § 9712(d)(3). The Plan seeks to collect premiums for the employees attributable to Robert Coal for the period February 1993 to April 1994.[7]

---

[6] As "related persons" within the meaning of the Coal Act, Cliffs Mining and Cleveland-Cliffs will be jointly and severally liable to Plaintiffs if Robert Coal is found to be liable. 26 U.S.C. § 9711(c).

[7] In their stipulation, the parties note that the uncollected premiums for that period would total $327,346.23. Since the filing of the Complaint, the parties have entered into an Escrow Agreement and Plan, pursuant to which Defendants are paying monthly premiums to an escrow account. The Agreement provides that the escrow payments shall be distributed to the successful party in this litigation. (Defs.' Mot. Dismiss n. 7; *see also* Perry Aff. ¶5.)

Defendants' argument centers around the 1988 settlement of the Kentucky lawsuit. Defendants claim that the federal District Court's approval of the settlement agreement, and its subsequent dismissal with prejudice of the lawsuit, constitutes a final judgment. That judgment, Defendants contend, may not be disturbed by obligations imposed by subsequent legislation--here, the 1992 Coal Act. (Defs.' Mem. Summ. J. at 11-16.)

The Court will briefly discuss the Kentucky lawsuit and resulting settlement agreement, as they form the basis of Defendants' Motion in the instant action.

1. The Kentucky Lawsuit

Robert Coal managed and supervised the construction and operation of two mines in Pike County, Kentucky, pursuant to management agreements with two coal mining companies. Robert Coal entered into the first agreement with Leslie Coal Mining Co. ("Leslie") in 1974, and the second with McInnes Coal Mining Co. ("McInnes") in 1976. Robert Coal employed all of the workers at the two mines from the dates of the respective management agreements until 1984. Robert Coal's employees during that period included classified workers who were members of and represented by UMWA.

The assets of the two mines were sold in 1984. Shortly thereafter, UMWA alleged that the sales violated the successorship clause of the NBCWAs because they were made without first securing the purchaser's consent that it would assume obligations under the NBCWAs. UMWA subsequently brought suit against several defendants, including Robert Coal, in the United States Court for the Eastern District of Kentucky.

In 1988, UMWA, Cliffs Mining (then known as Pickands Mather & Co. ("PM")), and Robert Coal entered into a settlement agreement in the Kentucky lawsuit. Under the agreement, Robert Coal agreed to provide health and other benefits to a group of its former employees from the Leslie and

McInnes mines, and to their surviving spouses and dependents, through January 1993. In return, UMWA released Robert Coal and Cliffs Mining "from any and all claims . . . which the Union now has or ever had against the PM Group" arising out of its dealings with the Leslie or McInnes mines. (Stip. Ex. A at 5.)

After approving the agreement, the District Court entered an order dismissing the Kentucky suit with prejudice. (Stip. Ex. B.) No appeal was taken from that dismissal.

Robert Coal provided benefits, as required by the settlement agreement, from May 1988 through January 1993. Thereafter, the 1992 Plan provided health benefits to those persons who had previously received such benefits from Robert Coal.

2. Procedural Posture

Plaintiffs bring this action to collect premium payments for which they allege Defendants are jointly and severally liable under the 1992 Plan. Plaintiffs seek declaratory relief, a judgment for $240,542.28, plus interest and liquidated damages as well as attorneys fees and costs.[8] Both Defendants and Plaintiffs have moved for Summary Judgment and Intervenor United States has filed a Memorandum in Opposition to Defendants' Motion.

II. *Standard of Review*

The Federal Rules of Civil Procedure state that:

> A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof . . . The judgment sought shall be rendered forthwith

---

[8] Beginning in February 1993, Plaintiffs have assessed against Defendants approximately $20,000 per month in premium payments. (Defs.' Mot. Dismiss n. 7; *see also* Perry Aff. ¶5.)

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(b)-(c). The party seeking summary judgment bears the initial burden of demonstrating an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In the instant case, Plaintiffs, Defendants and Intervenor United States agree that there are no genuine issues as to any material fact. The parties have also submitted a Stipulation of Facts. The Court thus proceeds to the legal issues before it.

III. *Analysis*

Defendants argue that the Coal Act was not intended by Congress to apply to signatory operators in Robert Coal's situation. They maintain that the approval of the settlement agreement and subsequent dismissal with prejudice of the Kentucky suit was a final judgment that fully extinguished Robert Coal's obligation to provide retiree health benefits. Finally, application of the Coal Act to Robert Coal, Defendants contend, reopens and disturbs the prior final judgment and thus raises serious constitutional questions. The Court will address each of Defendants' arguments in turn.

A. Applicability of the Coal Act to Robert Coal

1. Congressional Intent

The Coal Act generally makes "[a]ny last signatory operator" liable for the premium payments sought by Plaintiffs in this case. 26 U.S.C. § 9712(d)(3). Robert Coal, as a signatory operator to several NBCWAs, appears to fall within the intended scope of the Act.

Defendants argue, however, that despite its plain language, the Coal Act does *not* apply to Robert Coal. They argue that Congress did not intend to impose new liability on signatory operators whose obligations were extinguished by contractual agreements.

In general, courts should give effect to the plain language of a statute. *See, e.g., Richards v. United States*, 369 U.S. 1, 9 (1962) (in construing a statute, courts are to presume "that the legislative purpose is expressed by the ordinary meaning of the words used"); *see also, Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) ("Absent a clearly expressed legislative intention to the contrary, [statutory] language must ordinarily be regarded as conclusive").

Defendants argue that the Coal Act does not apply to them because "Congress never considered the possible effect of the Act on an operator in the unique situation presented herein." (Defs.' Mem. Summ. J. at 12.)

On questions of statutory interpretation, the Court searches for some clear indication of legislative intent. *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 647 (1990) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43). Here, the legislative history cited by Defendants shows only that Congress failed to affirmatively consider their situation. The Court can draw no inference at all regarding the intended or unintended application of the Act to those in Robert Coal's position merely from Congressional silence. *See, e.g., Warner-Lambert Co. v. Federal Trade Comm'n*, 562 F.2d 749, 758 n. 39 (D.C. Cir. 1977); *National Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689 (D.C. Cir. 1971). To impose such a standard would require Congress, in enacting any legislation, to anticipate the myriad situations in which the legislation could conceivably apply.

Moreover, the legislative history of the Act indicates that Congress understood and intended the Act to require signatory operators, who were no longer legally or contractually obligated to do so, to bear the cost of providing retired coal miners with health benefits. ("[W]ithdrawals of contributing employers from privately maintained benefit plans under collective bargaining agreements . . . result in substantially increased funding burdens for employers that continue to contribute to such plans . . .") (H.R. Conf. Rep. No. 102-461, at Title VI, § 6002 (1992)). Thus, Congress was well aware that the UMWA Funds' financial difficulties were in large part due to the fact that many signatory companies terminated their contractual health care obligations and dumped their responsibilities onto the UMWA Funds, thus adding to the financial burden of the remaining signatory operators.

For these reasons, the Court is unpersuaded by Robert Coal's contention that Congress implicitly exempted operators in its situation from the requirements imposed by the Act.[9]

2. Reopening the Kentucky Lawsuit

Defendants argue that application of the Coal Act to Robert Coal unconstitutionally reopens and disturbs a prior final judgment, namely the order entered in the Kentucky lawsuit.

The Kentucky settlement agreement released Robert Coal from any duty to provide further benefits "arising out of any Wage Agreement". (Stip. Ex. A; Settlemt. Agreemt. at 4.) But the settlement agreement did not by its plain terms purport to

---

[9] The language of the Coal Act itself indicates Congress's intent to impose a new statutory obligation on signatory operators without disturbing past contractual obligations. Section 9708 of the Coal Act provides that nothing in the Act is intended to have any effect on claims or obligations arising in connection with the 1950 or 1974 UMWA Benefit Plans as of February 1, 1993. 26 U.S.C. § 9708.

absolve Robert Coal of all prospective responsibilities which might arise under future legislation such as the Coal Act.

The Defendants misstate the issue–the Coal Act does not reimpose on Robert Coal the same obligation that it already satisfied through the settlement of the Kentucky lawsuit. Instead, the Coal Act creates future statutory liability and imposes a new and separate obligation on Robert Coal.

There is no question that the settlement agreement terminated Robert Coal's *contractual* obligation to contribute to the UMWA 1950 and 1974 Benefit Plans as of January 1993. The Coal Act, however, imposes a *statutory* obligation on Robert Coal to contribute to the new Combined Fund as of February 1993. The fact that the statutory obligations under the Coal Act are similar to or modeled on obligations created by earlier collective bargaining agreements does not mean they are "arising out of" such earlier agreements, as the settlement agreement provides. By Robert Coal's logic, any entity operating in a highly regulated, national industry would be able to forever insulate itself from future Congressional regulation by settling a contract dispute in federal court.

Defendants rely heavily on the D.C. Circuit Court's opinion in *Daylo v. Administrator of Veterans' Affairs*, 501 F.2d 811 (D.C. Cir. 1974), to support their argument that the Coal Act is inapplicable to them. The dispute in *Daylo* centered around a final judgment which was based on a Congressional statute. That statute was later amended. One of the parties advocated a retroactive application of the amended statute to the judgment, which would have nullified that judgment. The *Daylo* court determined that neither the statute's language nor its legislative history evinced Congressional intent to reopen final judgments entered pursuant to passage of the original statute.

Daylo resolved two suits involving (1) a single cause of action; (2) involving the same parties; (3) under a single statute.

The facts and legal issues in *Daylo* are distinguishable from the instant case. First, the instant case does not involve a single cause of action. Instead, the Kentucky suit involved a contractual dispute, while the current action involves a statutory obligation. Second, here there is no total overlap of parties. The 1993 Benefit Plan is a separate and distinct entity from UMWA. Finally, this action arises under a statute, the 1992 Coal Act, while the Kentucky suit arose under common-law contract principles.

This Court thus finds that application of the Coal Act to Robert Coal does not operate to reopen or disturb the Kentucky suit judgment.

B. Constitutionality of the Coal Act

1. Separation of Powers Challenge

Defendants claim that the Coal Act is unconstitutional because it impermissibly directs the reopening of a final judgment of an Article III court in violation of the Separation of Powers Doctrine. Defendants rely on *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), to support their argument.

As discussed, application of the Coal Act to Robert Coal does *not* disturb the final judgment entered in the Kentucky suit. The Court thus need not address Defendant's argument at great length but will discuss it briefly.

Plaut, like *Daylo*, is distinguishable from the instant case in both its facts and the applicable law. In *Plaut*, the Supreme Court invalidated a Congressional enactment that permitted cases already dismissed to be reinstated. The Court found the amendment unconstitutional because, "[h]aving achieved finality . . . a judicial decision becomes the last word of the judicial department *with regard to a particular case or controversy* . . ." *Plaut*, 115 S.Ct. at 1457 (emphasis added). That amendment, like the statute in *Daylo*, retroactively

changed the law which the trial court had applied at the time of its earlier decision.

Defendants argue that the rulings of federal courts in private contractual disputes bar Congress from imposing subsequent regulations that affect those parties. The Supreme Court has addressed this argument and has unambiguously held that "[c]ontracts, however express, cannot fetter the constitutional authority of Congress." *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986) (quoting *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-08); *see also*, *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947).

This Court thus finds that application of the Coal Act to Robert Coal does not violate the Separation of Powers Doctrine.

2. Due Process Challenge

Defendants assert that the Coal Act violates the Due Process Clause of the Fifth Amendment, which protects persons from being "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

In general, economic legislation satisfies the requirements of due process so long as it is rationally related to a legitimate government purpose. *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83-84 (1978); *Colorado Springs Production Credit Ass'n v. Farm Credit Admin.*, 758 F.Supp. 6, 9 (D.D.C. 1991), *aff'd*, 967 F.2d 648 (D.C. Cir. 1992).

Statutes that regulate commercial burdens and benefits are accorded a formidable presumption of constitutionality. *See*, *e.g.*, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976).

The presumption is even weightier when Congress enacts legislation under its Commerce Clause power, for such legislation is entitled to the most deferential level of judicial scrutiny. In this instance, a challenger must show that the legislature acted "in an arbitrary and irrational way." *Id.* A court must uphold the law if there is any rational reason for its enactment; regardless of whether Congress had that particular justification in mind when it enacted the legislation. *See, e.g., FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993).

The deferential standard applies even if the enactment readjusts benefits and burdens or "upsets otherwise settled expectations . . . [or] impose[s] a new duty or liability based on past acts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976). So long as the statute can be supported "by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

Many courts have recently considered due process challenges to the Coal Act. These courts have uniformly rejected the challenges. As a recent opinion noted, "*every* federal court that has addressed the substantive due process issue has concluded that the Coal Act does not violate the substantive component of the Fifth Amendment's Due Process Clause." *Bellaire Corp. v. Shalala*, Civ. Act. No. 93-183, slip. op. at 17 (D.D.C. April 21, 1997) (emphasis in original) (citing *Davon, supra*, 75 F.3d at 1127; *Lindsey Coal, supra*, 90 F.3d 688; *In re Blue Diamond Coal Co.*, 79 F.3d 516, 523 (6th Cir. 1996); *Barrick Gold Exploration Inc. v. Hudson*, 47 F.3d 832 (6th Cir.), *cert. denied*, 516 U.S. 813 (1995); *In re Chateaugay Corp.*, 53 F.3d 478, 491 (2d Cir. 1995), *cert. denied*, 516 U.S. 913 (1995)).

Enactment of the Coal Act rested on a Congressional determination that "the production, transportation, and use of

coal substantially affects interstate and foreign commerce and the national public interest". Pub. L. No. 102-486, § 19142(a)(1), 106 Stat. 2776, 3037 (1992). Congress determined that modification of the private health care benefit plan structure for coal industry retirees was necessary to ensure the stability of interstate commerce. Pub. L. No. 102-486 § 19142(a)(2), 106 Stat. 2776, 3037 (1992).

This Court, like all other courts that have considered the issue, concludes that Congress's stated objective in enacting the Coal Act constitutes a legitimate governmental purpose.

The means chosen by Congress to achieve its stated purpose involved identifying those "persons most responsible for plan liabilities in order to stabilize plan funding and allow for the provision of health care benefits to such retirees." Pub. L. No. 102-486 § 19142(a)(2), 106 Stat. 2776, 3037 (1992).

This Court (again, like all other courts that have considered the issue) concludes that Congress's chosen method of achieving its purpose is reasonable and thus survives rational basis review.

Defendants claim that "no rational basis exists for concluding that any expectation by Robert's retirees of receiving lifetime health benefit was Robert's responsibility". (Defs.' Mem. Summ. J. at 38). Several courts have recently rejected this argument, and this Court must do the same.

In *In re Blue Diamond Coal Co., et al. v. Shalala*, 79 F.3d 516 (6th Cir. 1996), the coal company argued, as does Robert Coal, that it had created no explicit promises or expectations of lifetime health benefits for its employees. The Court held it irrelevant that the company created no specific expectations in its employees; Congress could still impose Coal Act liability. *Id.* at 522-23. The Court reasoned that, as a signatory to the NBCWAs and contributor to the benefit funds, the company "contributed to a reasonable expectation of lifetime health

benefits". *Id.*, (citing *Davon v. Shalala*, 75 F.3d 1114, 1124-25 (7th Cir. 1996)).

Defendants claim that the court's order dismissing with prejudice the Kentucky lawsuit makes their situation unique does not change this outcome. *See Chateaugay*, 53 F.3d 478 (bankruptcy protections did not operate to relieve company of its obligations under the Coal Act); *Bellaire*, slip op. at 13-41 (application of Coal Act to companies that had never employed plaintiff miners did not violate due process); *Templeton Coal Co., Inc. v. Shalala*, 882 F.Supp. 799, 815 (S.D. Ind. 1995) (application of Coal Act to company who had previously satisfied its contractual obligation to pay premiums did not violate due process).

Finally, Defendants argue that the Coal Act, as applied to them, violates the so-called "Vested Rights Doctrine". Defendants contend that a final judgment creates an absolute, inviolable right that is immune from Congressional regulation. (Defs.' Mem. Summ. J. at 22-23) (citing *McCullough v. Com. of Virginia*, 172 U.S. 102 (1898).

"Vested Rights", however, deserve and receive no more protection than other property rights; alleged violations of those rights must also submit to the traditional due process analysis discussed earlier. *See, e.g., Johnston v. Cigna Corp.*, 14 F.3d 486, 490 (10th Cir. 1993). As also discussed earlier, the Coal Act easily survives such analysis.

3. Takings Clause Challenge

Defendants contend that any application of the 1992 Coal Act "that serves to annul, nullify or take away the right obtained by Robert through the Final Judgment constitutes an unlawful taking of property in violation of the Fifth Amendment, as applied to Robert". (Defs.' Mem. Summ. J. at 27.)

The Takings Clause prohibits the taking of private property "for public use, without just compensation." U.S. Const. amend. V. The Supreme Court has repeatedly stated that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (citation omitted).

Courts have decided Takings Clause challenges to the Coal Act in much the same way they decided substantive due process challenges--they have overwhelmingly rejected them and concluded that the Coal Act does not violate the Takings Clause. *See, e.g.*, *Bellaire*, slip. op. at 46 (citing cases that upheld the Coal Act in the face of takings clause challenges, including *Davon, Inc.*, 75 F.3d at 1127; *Lindsey Coal*, 90 F.3d 688; *In re Blue Diamond Coal Co.*, 79 F.3d 516, 523 (6th Cir. 1996); *Barrick Gold*, 47 F.3d at 832; and *Chateaugay*, 53 F.3d at 491).

The Supreme Court has articulated three factors to be used in ascertaining the existence of a compensable taking. These are "(1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations, and (3) the nature of the governmental action." *Connolly*, 475 U.S. at 225 (citing *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978)). *See also*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Eastern Enterprises v. Chater*, 110 F.3d 150, 160 (1st Cir. 1997) (citing *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 643-44 (1993)).

In determining whether application of the Coal Act to Robert Coal constitutes a compensable taking, the Court turns first to economic impact.

Defendants estimate the premiums assessed against Robert Coal at a minimum of $8.6 million.[10] While there may be some dispute as to the exact amount of the premiums, absolute precision on this point is not necessary. The Supreme Court has stated that "[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *Concrete Pipe*, 508 U.S. at 645. In the multiemployer benefit plan context, the proper inquiry is whether the employer's liability is proportionate to the employer's experience with the fund at issue. *Connolly*, 475 U.S. at 225.

Here, Robert Coal's liability to the 1992 Plan is based solely on the number of its former employees who are receiving benefits from the Plan. (U.S. Opp'n to Defs.'s Mot. Summ. J. at 35) (citing 26 U.S.C.§ 9712(d)(3)). Thus it is clear that Robert Coal's obligations to the Plan are reasonable and directly proportionate to its liability under the previous funds.

The second factor to be considered is the extent to which the regulation interferes with the claimant's reasonable investment-backed expectations. Robert Coal claims that it reasonably held an investment-backed expectation that it would be completely free of any future liability for retiree health benefits when it signed the settlement agreement. Since the Coal Act was enacted after Robert Coal entered into the settlement agreement, this issue presents a closer question than did the analysis under the "economic impact" prong of the test. Nevertheless, Robert Coal fails to meet its burden.

First, Robert Coal signed several NBCWAs which required signatory operators to continue making contributions to the Benefit Trusts, regardless of whether the operator did or did not

---

[10] Intervenor United States points out, however, that Defendants have not adjusted their numbers to their present value, making Defendants' figure an inflated estimate of their obligations to the 1992 Plan. (U.S. Opp. at 35-36 n. 42 (citing Perry Aff. Ex. C).)

sign any subsequent NBCWA. In *United Mine Workers of Am. v. Nobel*, 720 F.Supp. 1169, 1178 (W.D. Pa. 1989), *aff'd without opinion*, 902 F.2d 1558 (3d Cir. 1990) *cert. denied*, 499 U.S. 904 (1991), the Court held that:

> The language of the plan benefits contained in the past five collective bargaining agreements between the UMWA and the BCOA, providing that a pensioner 'will be entitled to a health services card for life,' together with the 25-year history of lifetime benefits prior to 1974, . . . establish that the *parties intended to provide health benefits to the individual plaintiffs for life*. We find that the language confers a right to benefits for the lifetime of the pensioner.

(emphasis added). *See also District 29, United Mine Workers of Am. v. United Mine Workers of Am. 1974 Benefit Plan & Trust*, 826 F.2d 280, 283 (4th Cir. 1987), *cert. denied*, 485 U.S. 935 (1988). Thus, Robert Coal's participation in the agreements weighs heavily against the "reasonableness" of its alleged investment-backed expectations of being free from all future obligations to provide health benefits.

Second, the Supreme Court has stated that companies who conduct business in historically regulated fields "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Concrete Pipe*, 508 U.S. at 645. Indeed, courts have repeatedly asserted that government involvement in the coal industry put coal operators on notice that the government might intervene in the management of benefit funds. As the Sixth Circuit noted in *Blue Diamond Coal*, 79 F.3d at 525 (citing *Davon*, 75 F.3d at 1128-29):

> "[T]he federal government pervasively regulates the coal mining industry, the UMWA Fund originated from a federal takeover of the nation's coal mines, and federal intervention has been required to settle strikes over benefits issues.

> Given these circumstances, Blue Diamond cannot argue that it was reasonable for [it] to believe that Congress would never intervene in the management of the UMWA Fund or its successor funds."

The third and final factor to be considered in determining whether the application of the 1992 Coal Act to Robert Coal constitutes an impermissible taking is the nature of the governmental action itself. Courts have much more readily found a taking when the government "physically invade[s] or permanently appropriate[s]" assets for its own use, as opposed to when the deprivation merely "arises from a public program that adjusts the benefits and burdens of economic life to promote the common good." *Connolly*, 475 U.S. at 225; *accord Keystone Bitum. Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 488 n. 18 (1987). As stated in *Chater*, "[t]o present this dichotomy is to resolve it. The Coal Act . . . *is* merely a public program that readjusts economic burdens, and the funds collected are paid to a private benefit fund, not to a government entity." *Chater*, 110 F.3d at 161.

Finally, the Supreme Court's decision in *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986), where it decided the constitutionality of certain provisions of the Multiemployer Pension Plan Amendments Act of 1980[11] ("MPPAA"), is instructive. Like the Coal Act, the MPPAA was enacted to protect participants in multiemployer benefit plans. Among its provisions is a requirement that an employer withdrawing from a multiemployer pension plan pay a fixed amount to that plan. Trustees who administered a multiemployer pension plan under a collective bargaining agreement contested the constitutionality of those withdrawal liability provisions. The trustees argued that the provisions imposed a new obligation on

---

[11] Employee Retirement Income Security Act of 1974, § 4201-4303, as amended, 29 U.S.C.A. §§ 1381-1453.

employers and plan participants that exceeded the obligations imposed by earlier contractual agreements. According to the trustees, the new statutory obligation destroyed the existing contractual rights and thus constituted an unconstitutional taking.

The *Connolly* Court upheld the MPPAA, even though the Act explicitly nullified the previous contractual provisions limiting employers' liability and imposed an additional statutory obligation on employers. The Court held that the MPPAA did not violate the Takings Clause of the Fifth Amendment, stating that "the United States has taken nothing for its own use, and only has nullified a contractual provision limiting liability by imposing an additional obligation that is otherwise within the power of Congress to impose." *Id.* at 224.

The Court's decision in this case is not as far-reaching as the Supreme Court's decision in *Connolly*. As discussed above, the Coal Act does *not* nullify the contractual agreement between Robert Coal and UMWA. It does, however, impose "an additional [statutory] obligation that is otherwise within the power of Congress to impose." *Id.*

This Court find that the Coal Act, like the MPPAA, works no unconstitutional Taking.

4. Appointments Clause Challenge

Defendants claim that the 1992 Coal Act violates the Appointments Clause of the Constitution, which states in relevant part that, "[The President,] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all Officers of the United States . . ." U.S. Const. Art. II, § 2, cl. 2.

The Court finds Defendants' argument to be without merit. The definition of an "officer" requires (1) a continuing and formalized relationship of employment with the United States

government; and (2) the exercise of significant authority. *See Buckley v. Valeo*, 424 U.S. 1, 125-26 (1976).

The Trustees of the 1992 Plan are not "officers" under the *Buckley* standard. First, they hold no "office" or continuing employment relationship with the United States government; the Plan acts as a private entity. (U.S. Opp'n to Defs.' Mot. Summ. J. at 42) (citing Defs.' Mot. Summ. J. at 40-51). Not only are the Trustees of the Plan and the UMWA private parties, but the Coal Act itself expressly provides that the 1992 Plan is a "private plan". 26 U.S.C. § 9712(a)(1). The 1992 Plan operates like any other private multiemployer benefit plan, differing only in that the obligation imposed on signatory operators to contribute stems from a statutory as opposed to contractual obligation. The 1992 Plan and its Trustees act only to further the private interests of the Plan beneficiaries, not the public interest or the federal government.

Second, while it is true as Defendants argue, that the Trustees do exercise "significant authority", what is relevant is that they do not exercise significant *governmental* authority. The Trustees exercise no governmental authority of any kind. Instead, they are charged with operating a private multiemployer plan. The Trustees exercise their authority to serve only the interests of the Plan beneficiaries, not the federal government or even the public-at-large. *See, e.g., Melcher v. Federal Open Market Committee*, 644 F.Supp. 510, 521 (D.D.C. 1986) (selection of members of Federal Reserve Board's federal open market committee by private individuals did not violate Appointments Clause), *aff'd in part and vacated in part on other grounds*, 836 F.2d 561 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1042 (1988).

Since the Trustees of the 1992 Plan possess none of the attributes of "officers" pursuant to the Appointments Clause, this Court holds that they need not be appointed in conformity with the requirements of that Clause.

C. Credit for Robert Coal's Payments under Kentucky Settlement Agreement

In its Answer to Plaintiff's Complaint, Defendants assert that Robert Coal should receive a "credit or set off for the costs that it voluntarily assumed and paid in providing health and other benefits from May of 1988 through . . . January 31, 1993." (Defs.' Answer ¶52.) As discussed above, Robert Coal's payments pursuant to the Kentucky agreement stemmed from a contractual obligation. That obligation is separate and distinct from the statutory obligation imposed upon Robert Coal by the Coal Act. The Court thus rejects Robert Coal's argument and finds that a set off is not warranted in this case.

IV. *Conclusion*

For the reasons discussed above, Defendants' Motion for Summary Judgment [#38] is hereby **denied**, and Plaintiffs' Motion for Summary Judgment [#36] is hereby **granted**.

An Order will issue with this Opinion.

November 17, 1997

GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Article II, Section 2, Clause 2
Treaties–Appointment of Officers.

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Court of Law, or in the Heads of Departments.

Amendment 5: Criminal actions–Provisions concerning–Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ENERGY POLICY ACT OF 1992, P.L. 102-486, TITLE XIX, SUBTITLE C - HEALTH CARE OF COAL MINERS

Sec. 19141. Short Title. This subtitle may be cited as the "Coal Industry Retiree Health Benefit Act of 1992."

* * *

SUBCHAPTER A–Definitions of General Applicability

§ 9701. Definitions of general applicability.

(a) Plans and Funds–For purposes of this chapter –

(1) UMWA Benefit Plan.–

(A) In general. The term "UMWA Benefit Plan" means a plan –

(i) which is described in section 404(c), or a continuation thereof; and

(ii) which provides health benefits to retirees and beneficiaries of the industry which maintained the 1950 UMWA Pension Plan.

(B) 1950 UMWA Benefit Plan. The term "1950 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired before 1976.

(C) 1974 UMWA Benefit Plan. The term "1974 UMWA Benefit Plan" means a UMWA Benefit Plan, participation in which is substantially limited to individuals who retired on or after January 1, 1976.

* * *

(4) 1992 UMWA Benefit Plan–The term "1992 UMWA Benefit Plan" means the plan referred to in section 9713A.

(5) Combined Fund–The term "Combined Fund" means the United Mine Workers of America Combined Benefit Fund established under section 9702.

(b) Agreements–For purposes of this section –

* * *

(2) Settlors–The term "settlors" means the United Mine Workers of America and the Bituminous Coal Operators' Association, Inc. (referred to in this chapter as the "BCOA").

(3) National Bituminous Coal Wage Agreement–The term "National Bituminous Coal Wage Agreement" means a collective bargaining agreement negotiated by the BCOA and the United Mine Workers of America.

(c) Terms relating to operators–For purposes of this section–

(1) Signatory operator–The term "signatory operator" means a person which is or was a signatory to a coal wage agreement.

(2) Related persons–

(A) In general. A person shall be considered to be a related person to a signatory operator if that person is –

(i) a member of the controlled group of corporations (within the meaning of section 52(a)) which includes such signatory operator;

(ii) a trade or business which is under common control (as determined under section 52(b)) with such signatory operator; or

(iii) any other person who is identified as having a partnership interest or joint venture with a signatory operator in a business within the coal industry, but only if such business employed eligible beneficiaries, except that this clause shall not apply to a person whose only interest is as a limited partner.

A related person shall also include a successor in interest of any person described in clause (i), (ii), or (iii).

* * *

PART II – FINANCING

* * *

§ 9704. Liability of assigned operators.

(a) Annual premiums–Each assigned operator shall pay to the Combined Fund for each plan year beginning on or after February 1, 1993, an annual premium equal to the sum of the following three premiums –

(1) the health benefit premium determined under subsection (b) for such plan year, plus

(2) the death benefit premium determined under subsection (c) for such plan year, plus

(3) the unassigned beneficiaries premium determined under subsection (d) for such plan year.

Any related person with respect to an assigned operator shall be jointly and severally liable for any premium required to be paid by such operator.

(b) Health benefit premium–For purposes of this chapter –

(1) In general–The health benefit premium for any plan year for any assigned operator shall be an amount equal to the product of the per beneficiary premium for the plan year multiplied by the number of eligible beneficiaries assigned to such operator under section 9706.

(2) Per beneficiary premium–The Commissioner of Social Security shall calculate a per beneficiary premium for each plan year beginning on or after February 1, 1993, which is equal to the sum of –

(A) the amount determined by dividing –

(i) the aggregate amount of payments from the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan for health benefits (less reimbursements but including administrative costs) for the plan year beginning July 1, 1991, for all individuals covered under such plans for such plan year, by

(ii) the number of such individuals, plus

(B) the amount determined under subparagraph (A) multiplied by the percentage (if any) by which the medical component of the Consumer Price Index for the calendar year in which the plan year begins exceeds such component for 1992.

* * *

§ 9706. Assignment of eligible beneficiaries.

(a) In general–For purposes of this chapter, the Secretary of Health and Human Services shall, before October 1, 1993, assign each coal industry retiree who is an eligible beneficiary to a signatory operator which (or any related person with respect to which) remains in business in the following order:

(1) First, to the signatory operator which –

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry for at least 2 years.

(2) Second, if the retiree is not assigned under paragraph (1), to the signatory operator which –

(A) was a signatory to the 1978 coal wage agreement or any subsequent coal wage agreement, and

(B) was the most recent signatory operator to employ the coal industry retiree in the coal industry.

(3) Third, if the retiree is not assigned under paragraph (1) or (2), to the signatory operator which employed the coal industry retiree in the coal industry for a longer period of time than any other signatory operator prior to the effective date of the 1978 coal wage agreement.

* * *

SUBCHAPTER C–Health Benefits of Certain Miners

* * *

PART II - 1992 UMWA BENEFIT PLAN

§ 9712. Establishment and coverage of 1992 UMWA benefit plan.

(a) Creation of plan–

(1) In general–As soon as practicable after the enactment date, the settlors shall create a separate private plan which shall be known as the United Mine Workers of America 1992 Benefit Plan. For purposes of this title, the 1992 UMWA Benefit Plan shall be treated as an organization exempt from taxation under section 501(a). The settlors shall be responsible for designing the structure, administration and terms of the 1992 UMWA Benefit Plan, and for appointment and removal of the members of the board of trustees. The board of trustees shall initially consist of five members and shall thereafter be the number set by the settlors.

(2) Treatment of plan–The 1992 UMWA Benefit Plan shall be –

(A) a plan described in section 302(c)(5) of the Labor Management Relations Act, 1947 (29 U.S.C. 186(c)(5)),

(B) an employee welfare benefit plan within the meaning of section 3(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1002(1)), and

(C) a multiemployer plan within the meaning of section 3(37) of such Act (29 U.S.C. 1002(37)).

(b) Coverage requirement–

(1) In general–The 1992 UMWA Benefit Plan shall only provide health benefits coverage to any eligible beneficiary who is not eligible for benefits under the Combined Fund and shall not provide such coverage to any other individual.

(2) Eligible beneficiary–For purposes of this section, the term "eligible beneficiary" means an individual who –

(A) but for the enactment of this chapter, would be eligible to receive benefits from the 1950 UMWA Benefit Plan or the 1974 UMWA Benefit Plan, based upon age and service earned as of February 1, 1993; or

(B) with respect to whom coverage is required to be provided under section 9711, but who does not receive such coverage from the applicable last signatory operator or any related person,

and any individual who is eligible for benefits by reason of a relationship to an individual described in subparagraph (A) or (B). In no event shall the 1992 UMWA Benefit Plan provide health benefits coverage to any eligible beneficiary who is a coal industry retiree who retired from the coal industry after September 30, 1994, or any beneficiary of such individual.

(c) Health benefits–

(1) In general–The 1992 UMWA Benefit Plan shall provide health care benefits coverage to each eligible beneficiary which is substantially the same as (and subject to all the limitations of) coverage provided under the 1950 UMWA Benefit Plan and the 1974 UMWA Benefit Plan as of January 1, 1992.

(2) Managed care–The 1992 UMWA Benefit Plan shall develop managed care and cost containment rules which shall be applicable to the payment of benefits under this subsection. Application of such rules shall not cause the plan to be treated as failing to meet the requirements of this subsection. Such rules shall preserve freedom of choice while reinforcing managed care network use by allowing a point of service decision as to whether a network medical provider will be used. Major elements of such rules may include, but are not limited to, elements described in paragraph (3).

(3) Major elements of rules–Elements described in this paragraph are –

(A) implementing formulary for drugs and subjecting prescription program to a rigorous review of appropriate use,

(B) obtaining a unit price discount in exchange for patient volume and preferred provider status with the amount of the potential discount varying by geographic region,

(C) limiting benefit payments to physicians to the allowable charge under title XVIII of the Social Security Act, while protecting beneficiaries from balance billing by providers,

(D) utilizing, in the claims payment function "appropriateness of service" protocols under title XVIII of the Social Security Act if more stringent,

(E) creating mandatory utilization review (UR) procedures, but placing the responsibility to follow such procedures on the physician or hospital, not the beneficiaries,

(F) selecting the most efficient physicians and state-of-the-art utilization management techniques, including ambulatory care techniques, for medical services delivered by the managed care network, and

(G) utilizing a managed care network provider system, as practiced in the health care industry, at the time medical services are needed (point-of-service) in order to receive maximum benefits available under this subsection.

(4) Last signatory operators–The board of trustees of the 1992 UMWA Benefit Plan shall permit any last signatory operator required to maintain an individual employer plan under section 9711 to utilize the managed care and cost containment rules and programs developed under this subsection if the operator elects to do so.

(5) Standards of quality–Any managed care system or cost containment adopted by the board of trustees of the 1992 UMWA Benefit Plan or by a last signatory operator may not be implemented unless it is approved by, and meets the

standards of quality adopted by, a medical peer review panel, which has been established –

(A) by the settlors, or

(B) by the United Mine Workers of America and a last signatory operator or group of operators.

Standards of quality shall include accessibility to medical care, taking into account that accessibility requirements may differ depending on the nature of the medical need.

(d) Guarantee of benefits–

(1) In general–All 1988 last signatory operators shall be responsible for financing the benefits described in subsection (c), in accordance with contribution requirements established in the 1992 UMWA Benefit Plan. Such contribution requirements, which shall be applied uniformly to each 1988 last signatory operator, on the basis of the number of eligible and potentially eligible beneficiaries attributable to each operator, shall include:

(A) the payment of annual prefunding premium for all eligible and potentially eligible beneficiaries attributable to a 1988 last signatory operator,

(B) the payment of a monthly per beneficiary premium by each 1988 last signatory operator for each eligible beneficiary of such operator who is described in subsection (b)(2) and who is receiving benefits under the 1992 UMWA Benefit Plan, and

(C) the provision of security (in the form of a bond, letter of credit or cash escrow) in an amount equal to a portion of the projected future cost to the 1992 UMWA Benefit Plan of providing health benefits for eligible and potentially eligible beneficiaries attributable to the 1988 last signatory operator. If a 1988 last signatory operator is unable to provide the security required, the 1992 UMWA Benefit Plan shall require the operator to pay an annual prefunding premium that is greater than the premium otherwise applicable.

(2) Adjustments–The 1992 UMWA Benefit Plan shall provide for –

(A) annual adjustments of the per beneficiary premium to cover changes in the cost of providing benefits to eligible beneficiaries, and

(B) adjustments as necessary to the annual prefunding premium to reflect changes in the cost of providing benefits to eligible beneficiaries for whom per beneficiary premiums are not paid.

(3) Additional liability–Any last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium under paragraph (1)(B) for each eligible beneficiary described in such paragraph attributable to that operator.

(4) Joint and several liability–A 1988 last signatory operator or last signatory operator described in paragraph (3), and any related person to any such operator, shall be jointly and severally liable with such operator for any amount required to be paid by such operator under this section.

(5) Deductibility–Any premium required by this section shall be deductible without regard to any limitation on deductibility based on the prefunding of health benefits.

(6) 1988 last signatory operator–For purposes of this section, the term "1988 last signatory operator" means a last signatory operator which is a 1988 agreement operator.

* * *

SUBCHAPTER D. Other Provisions

* * *

§ 9721. Civil enforcement.

The provisions of section 4301 of the Employee Retirement Income Security Act of 1974 shall apply to any claim arising out of an obligation to pay any amount required to be paid by

this chapter in the same manner as any claim arising out of an obligation to pay withdrawal liability under subtitle E of title IV of such Act. For purposes of the preceding sentence, a signatory operator and related persons shall be treated in the same manner as employers.

* * *

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
Pikeville Division

UNITED MINE WORKERS OF AMERICA, Plaintiff,	)	
v.	)	Civil Action No. 84-338
PICKANDS MATHER & CO., et al., Defendants.	)	

STIPULATION AND ORDER OF
DISMISSAL WITH PREJUDICE

The United Mine Workers of America ("UMWA"), Pickands Mather & Co., Robert Coal Company, Leslie Coal Mining Company, Inc., McInnes Coal Mining Company, Inc., Sidney Coal Company, Inc., A. T. Massey Coal Company, Inc., Ora Mae Coal Company, Inc., Carolina Power & Light Company, Road Fork Development Company, Inc., George Oberlick, Raymond Bradbury, and Herbert B. Cline, by their undersigned counsel, hereby stipulate and agree that based on their Settlement Agreements, of May 23rd, 1988, the above captioned action shall be dismissed with prejudice in their entirety as to all defendants.

/s/ Judith A. Scott
Judith A. Scott
900 - Fifteenth Street, NW
Washington, DC 20005
(202) 842-7340

Counsel for the United Mine Workers of America

/s/ William [illegible]
Smith, Heenan & Althen
1110 Vermont Ave., NW
Washington, DC 20005
(202) 887-0800

Counsel for A. T. Massey Coal Co., Inc., Ora Mae Coal Co., Inc., Sidney Coal Co., Inc., Road For Development Co., Inc., George Oberlick, Raymond Bradbury, and Herbert Cline

/s/ Anthony J. Polito
Polito & Smock, P.C.
Suite 400
Four Gateway Center
Pittsburgh, PA 15222
(412) 312-3500

Counsel for Pickands Mather & Co., and Robert Coal Co.

/s/ Lloyd Sutter *
King & Spaulding
2500 Trust Company Tower
Atlanta, GA 30303
(404) 572-4600
* [illegible]

Counsel for Carolina Power and Light Company, Leslie Coal Mining Co., Inc., and McInnes Coal Mining, Co., Inc.

Dated: 5/23/88

ORDER

Upon the Stipulation of the parties and being duly advised of the Settlement Agreements and Release entered by the various parties and approved by this Court (Exhibits A, B and C hereto), the Court orders this 27 day of May, 1988, that the above captioned action of the United Mine Workers of America, be and hereby is dismissed with prejudice in its entirety as to all defendants and that each party bear its own costs.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR.
UNITED STATES DISTRICT JUDGE

[EXHIBIT A]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

UNITED MINE WORKERS OF AMERICA, Plaintiff,	)
v.	) Civil Action No. 84-338
PICKANDS MATHER & COMPANY, INC.; ROBERT COAL COMPANY; LESLIE COAL MINING COMPANY, INC.; MCINNES COAL MINING COMPANY, INC.; SIDNEY COAL COMPANY, INC.; A. T. MASSEY COAL COMPANY, INC.; CAROLINA POWER & LIGHT; ROAD FORK DEVELOPMENT COMPANY, INC.; GEORGE OBERLICK, RAYMOND BRADBURY, and HERBERT B. CLINE, individually and as Officers and Directors of Sidney Coal Company, Inc., Defendants.	)

SETTLEMENT AGREEMENT

The International Union, United Mine Workers of America ("UMWA"), Pickands Mather & Co. ("PM") and Robert Coal Company ("Robert"), for and in consideration of the mutual

promises and releases contained herein, and for other good and valuable consideration, hereby agree to the following terms and conditions for the full and final settlement and release of all Claims, as defined herein, between the UMWA, PM and Robert, and for the dismissal with prejudice of the above captioned case as to PM and Robert.

Recitals

The UMWA instituted the above action against various defendants, including PM and Robert, complaining generally over the sale of the assets of the Leslie and McInnes Mines in Pike County, Kentucky to Sidney Coal Company ("Sidney") on October 1, 1984. More specifically, the UMWA alleged, *inter alia*, that the asset sales violated the successorship clause of Article I of the 1981 and/or 1984 National Bituminous Coal Wage Agreements ("Wage Agreement(s)"), because the sales were made without first securing the agreement of Sidney to assume obligations under the Wage Agreements.

Robert's agreements to manage the Leslie and McInnes Mines were terminated as of September 30, 1984. Since that time, Robert has not conducted any coal mining related activity or employed any individuals in classified service at any location.

Terms of Settlement and Release

1. Although PM and Robert have denied and continue to deny any liability in this case, Robert will, voluntarily and without prejudice to its position that it is not contractually or legally obligated to provide health and other non-pension benefits to its present or future pensioners and surviving spouses (and qualified dependents thereof) (hereinafter collectively designated as the "Pensioner Group") and also without prejudice to its position that the 1974 Benefit Plan and Trust of the UMWA Health and Retirement Funds is solely

obligated to provide such benefits to the Pensioner Group, agree to:

(a) continue to provide health and certain death benefits to the pensioners and surviving spouses (and qualified dependents thereof) identified in Exhibit A attached hereto until 11:59 p.m., January 31, 1993, provided they remain eligible for such benefits during that period under the terms of the 1984 Wage Agreement; and

(b) also provide health and certain death benefits for a *maximum* of twelve (12) additional pensioners and surviving spouses (and qualified dependents thereof) whose last signatory classified service was with Robert, beginning with the date any or all of them meet the eligibility criteria for such benefits under Article XX of the 1984 Wage Agreement and ending at 11:59 p.m., January 31, 1993, provided they remain eligible for such benefits during that period under the terms of the 1984 Wage Agreement.

2. The UMWA waives and releases any claim that PM and/or Robert were or are now bound by the 1988 Wage Agreement at the former Leslie and McInnes Mines at any time. Without admitting or acknowledging that either PM or Robert was a signatory to the 1984 Wage Agreement, Robert will provide the aforesaid health and death benefits in the same manner and amounts and on the same terms and conditions which were set forth in Article XX of the 1984 Wage Agreement, subject however in any case to any limitations or conditions set forth in this Settlement Agreement.

3. Although PM has denied and continues to deny any liability for any actions or alleged commitments of its own or of Robert, PM agrees to guarantee the satisfaction of Robert's obligations under this Settlement Agreement to provide certain health and death benefits.

4. It is understood and agreed by the parties hereto that, in accordance with this Settlement Agreement, after 11:59 p.m., January 31, 1993, neither PM nor Robert shall have any obligation or duty to continue or to otherwise provide to any former employee or pensioner of Robert at the former Leslie and McInnes Mines, or to any surviving spouse or dependents of such former employee or pensioner, any health or other non-pension benefits, arising out of any Wage Agreement, including but not limited to those benefits which Robert is providing pursuant to the terms of this Settlement Agreement.

5. In consideration for Robert's provision of certain health and death benefits as provided for herein and PM's guarantee of Robert's obligations hereunder, and other good and valuable considerations, the UMWA, on its own behalf and on behalf of its Districts, Locals, and the members thereof, as well as their respective successors and assigns, heirs, devisees, estates and personal representatives (hereinafter collectively designated as "Union"), waives, releases and forever discharges PM and Robert, their respective present or former parents, subsidiaries and affiliated companies, and their officers, directors, stockholders, owners, agents, attorneys, servants and employees, as well as their successors, predecessors, assigns, heirs, devisees, estates and personal representatives (hereinafter collectively referred to as the "PM Group"), of and from any and all claims, demands, liabilities, causes of action and damages of every kind and nature, including without limitation wages, fringe benefits, health and other non-pension benefits (except as expressly provided for herein), dues, royalty payments to the UMWA Health and Retirement Funds, punitive damages, loss of reputation, reimbursement of selective strike benefits, consequential damages, attorneys' fees and costs, and declaratory and injunctive relief, whether known, unknown or hereafter discovered, even if events after the date hereof contribute thereto, which the Union now has or ever had against the PM Group arising out of or relating, in whole or in part, to

(a) their relationship and involvement in any way and at any time with Carolina Power & Light Company ("CP&L"), Leslie Coal Mining Company ("Leslie") and/or McInnes Coal Mining Company ("McInnes"), or any of them, at the former Leslie and McInnes Mines in Pike County, Kentucky, without limitation; (b) the termination of operations at the Leslie and McInnes Mines, (c) the sale of PM's stock interest in Leslie and McInnes to CP&L in 1983; (d) the sale of assets of Leslie and McInnes to Sidney on October 1, 1984; (e) the employment or alleged employment of UMWA members at the former Leslie and McInnes Mines; (f) their actual or alleged status as signatories to any Wage Agreement with the UMWA at the former Leslie and McInnes Mines; and (g) matters in any way and at any time relating to the former Leslie and McInnes Mines without limitation, whether before or after the sales of assets to Sidney; and also including but not limited to those claims which have been asserted or which could have been asserted against the PM Group in the complaint and amended complaints filed in the above styled civil action (herein designated collectively as "Claims"); except that with respect to the UMWA's members, such release by the Union shall apply only to such claims or matters which the UMWA, in its capacity as its members' exclusive collective bargaining representative, would have the authority to release for such members without their consent, including by way of example but without limitation, any claim arising out of Robert's and/or PM's alleged violation of the successorship provisions of Article I of any Wage Agreement. The UMWA, its Districts and Locals agree that they shall not initiate, voluntarily join or take an active part in any legal action or other proceeding which asserts an obligation on the part of Robert or PM to continue to provide health or non-pension benefits to the Pensioner Group beyond the terms and conditions of this Settlement Agreement. The parties also agree that such release in no way shall be construed as the Union's release of any present or future liability of the 1974 Benefit

Plan and Trust for the health and certain non-pension benefits of the Pensioner Group.

6. The Union agrees promptly to dismiss the above action with prejudice. The UMWA has executed such stipulation and delivered it to counsel for PM and Robert contemporaneously with the execution of this Settlement Agreement.

7. In consideration for the UMWA's dismissal of the above styled action and other good and valuable consideration, the PM Group hereby waives, releases and forever discharges the UMWA, its Districts and Locals, and their respective officers, directors, members, agents, attorneys, servants, employees, successors, predecessors, assigns, heirs, devisees, estates and personal representatives of from any and all claims, demands, liabilities, causes of action and damages of every kind and nature, including without limitation, actual, consequential and punitive damages, attorneys' fees and costs, and declaratory and injunctive relief, whether known, unknown or hereafter discovered, even if events after the date hereof contribute thereto, arising out of or related, in whole or in part, to (a) the sale of Leslie and McInnes' assets to Sidney Coal Company, or (b) matters in any way and at any time relating to the former Leslie and McInnes Mines without limitation, whether before or after the sales of assets to Sidney (herein described collectively as "Claims"); except that with respect to employees included in the PM Group, such release shall apply only to such claims or matters which PM and/or Robert have asserted, or could have asserted, in their capacity as the employer of such individuals.

8. The parties acknowledge that they have entered into this Settlement Agreement solely in order to resolve their respective interests and to avoid the expense and disruption of prolonged litigation involving many disputed issues of law and fact. Neither this Settlement Agreement, nor any of the terms thereof, nor any payments made pursuant to those terms, nor

any Stipulation of Dismissal filed pursuant hereto, nor the releases herein provided, nor any payments made pursuant to the terms of the February 8, 1988 Agreement between Robert and the UMWA which is incorporated herein (which Agreement shall be deemed to be cancelled and terminated upon the signing of this Settlement Agreement), shall be construed as, or deemed to be evidence of, any admission on the part of any party, entity or individual of any responsibility or liability whatsoever. Further, neither this Settlement Agreement, nor any of the terms thereof, nor any payments made pursuant to those terms, nor any Stipulation of Dismissal filed pursuant hereto, nor the releases herein provided, nor any payments made pursuant to the terms of the February 8, 1988 Agreement between Robert and the UMWA which is incorporated herein (which Agreement shall be deemed to be cancelled and terminated upon the signing of this Settlement Agreement), shall be construed as, or deemed to be evidence of, any admission on the part of any party, entity or individual of any lack of responsibility or liability of the 1974 Benefit Plan and Trust for the health and certain non-pension benefits of the Pensioner Group.

9. The UMWA represents and warrants that it has the authority to enter into this Settlement Agreement on its own behalf and on behalf of the persons and entities referred to herein collectively as the Union.

10. PM and Robert represent and warrant that they have the authority to enter into this Settlement Agreement on their own behalf and on behalf of the persons or entities referred to herein collectively as the "PM Group."

11. The parties agree that this Settlement Agreement contains all the promises and covenants made by them and supersedes all prior agreements and negotiations among them with respect to the subject matter hereof.

In witness whereof, the parties have caused this Settlement Agreement to be executed by their officers thereunto duly authorized on the dates indicated.

INTERNATIONAL UNION,
UNITED MINE WORKERS OF AMERICA,

By /s/ Cecil E Roberts
Its [Vice President]
Date [May 23, 1988]

PICKANDS MATHER & CO.

By [illegible]
Its [President]
Date [May 20, 1988]

ROBERT COAL COMPANY

By [illegible]
Its [President]
Date [May 20, 1988]

ROBERT COAL COMPANY
RETIREES AND SURVIVING SPOUSES

Leslie Mine

Pensioner's Name	S.S. No.
Wilson, Henry	232-34-8299
Ross, Bud	232-50-2198
Spradlin, Carlos	233-36-0939
Castle, James	233-36-1615
Mollett, Elmer	234-40-1334
Crum, William	234-40-4030
Ramirez, Antonio	234-48-0542
Varney, William	235-18-5876
Taylor, Melvin	235-26-7511
Barger, William	235-32-3335
Harrison, Gene	236-36-7598
Robinson, Donald	236-36-7684
Davis, Ewell	236-54-5559
Curry, Clifford	236-58-4893
Clay, Wallace	236-66-8072
Compton, Hubert	404-32-1070
Murphy, Lafe	404-34-4682
Hall, Doffie*	402-54-0501
Adkins, Naomi*	235-52-6795
Cicso, Mavis L.*	233-14-3758
Blackburn, Dallas L., Jr.	234-98-4203
Sheppard, Mabel*	235-44-1593
Horn, Carl*	403-74-7194
Jarrell, Jack	235-44-3678
Kennedy, Leslie K.	268-48-1208
Sagage, Herbert	236-36-8186

McInnes Mine

Coleman, Paul	236-28-8817
Collins, James	302-32-3761
Slone, Shirley*	404-58-6710
Blackburn, William	407-68-8018
Caudill, Roland	405-32-1534
Francisco, Chester A.	402-24-6185

*Surviving Spouse

EXHIBIT A

(2)

Supreme Court, U.S.
FILED
APR 19 1999
OFFICE OF THE CLERK

No. 98-1311

In the Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT COAL COMPANY, ET AL., PETITIONERS

v.

MICHAEL HOLLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
DOUGLAS N. LETTER
MARK B. STERN
KATHLEEN MORIARTY MUELLER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

2498

QUESTIONS PRESENTED

1. Whether the provisions of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, that assign responsibility for funding the health-care benefits of retired coal miners and their dependents to the coal mine operators that previously employed the miners pursuant to collective bargaining agreements that promised miners health-care benefits for life, violate the Due Process or Just Compensation Clause of the Fifth Amendment.

2. Whether those provisions of the Coal Act, as applied to this case, violate the doctrine of separation of powers because, before the Coal Act was enacted, petitioner Robert Coal Company entered into a settlement agreement with a union, embodied in a final judgment of a federal district court, limiting its financial exposure for its former employees' health-care benefits.

3. Whether the provisions of the Coal Act establishing a private entity to assess premiums and to administer a health benefit plan for retired coal miners and their dependents, and authorizing that entity to sue to compel compliance with the Act's financing provisions, is consistent with the Appointments Clause of the Constitution.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Association of Bituminous Contractors, Inc. v. *Apfel*, 156 F.3d 1246 (D.C. Cir. 1998)	9, 10, 14
Auffmordt v. *Hedden*, 137 U.S. 310 (1890)	20
Buckley v. *Valeo*, 424 U.S. 1 (1976)	19
Chateaugay Corp., In re, 53 F.3d 478 (2d Cir.), cert. denied, 516 U.S. 913 (1995)	2-3
Connolly v. *Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986)	8
Eastern Enters. v. *Apfel*, 118 S. Ct. 2131 (1998)	*passim*
Marks v. *United States*, 430 U.S. 188 (1977)	14, 15
Mary Helen Coal Corp. v. *Hudson*, 164 F.3d 624 (4th Cir. 1998)	16
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)	17, 18
United States v. *Germaine*, 99 U.S. 508 (1878)	20
United States v. *Hartwell*, 73 U.S. (6 Wall.) 385 (1868)	20, 21
Unity Real Estate Co. v. *Hudson*, No. 97-3234, 1999 WL 167765 (3d Cir. Mar. 29, 1999)	14

Constitution and statutes:	Page
U.S. Const.:	
Art. II, § 2, Cl. 2 (Appointments Clause)	7, 9, 18, 19, 20
Amend. V	8
Due Process Clause	7, 11
Just Compensation Clause	7, 11
Act of Feb. 25, 1791, ch. 10, § 4, 1 Stat. 192-193	20
Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. 9701 *et seq.*	*passim*
26 U.S.C. 9701(c)	7
26 U.S.C. 9702	4
26 U.S.C. 9711(a)	5
26 U.S.C. 9712(a)(1)	5, 9, 21
26 U.S.C. 9712(a)(2)	5, 21
26 U.S.C. 9712(b)(2)	14
26 U.S.C. 9712(b)(2)(A)	5
26 U.S.C. 9712(b)(2)(B)	5
26 U.S.C. 9712(d)	5
26 U.S.C. 9712(d)(3)	14
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*:	
29 U.S.C. 1002(1)	5
29 U.S.C. 1002(37)	5
Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*	19
Labor Management Relations Act of 1947, § 302(c)(5), 29 U.S.C. 186(c)(5)	5
12 U.S.C. 1723(b)	20
20 U.S.C. 1087-2(c)	20
28 U.S.C. 2403(a)	7
Miscellaneous:	
138 Cong. Rec. 5331 (1992)	4

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1311

ROBERT COAL COMPANY, ET AL., PETITIONERS

v.

MICHAEL HOLLAND, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-3a) is unpublished, but the disposition is available at 1998 WL 794832. The memorandum opinion of the district court (Pet. App. 4a-26a) is reported at 986 F. Supp. 621.

JURISDICTION

The judgment of the court of appeals was entered on October 16, 1998. On January 6, 1999, the Chief Justice entered an order extending the time for filing a petition for a writ of certiorari to and including February 15, 1999 (a federal holiday). The petition for a writ of certiorari was filed on February 16, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act or Act), 26 U.S.C. 9701 *et seq.*, to address a crisis in the funding of two multi-employer welfare benefit plans that paid for the health-care benefits of coal miners, retired miners, and their dependents. Those multi-employer plans, the United Mine Workers of America 1950 Benefit Plan and Trust (1950 Benefit Trust) and the United Mine Workers of America 1974 Benefit Plan and Trust (1974 Benefit Trust), were created and funded through a series of national collective bargaining agreements, known as National Bituminous Coal Wage Agreements (NBCWAs), between the United Mine Workers of America (UMWA) and the Bituminous Coal Operators Association (BCOA). See generally *Eastern Enters.* v. *Apfel*, 118 S. Ct. 2131, 2137-2139 (1998).

Before 1974, a single multi-employer fund was the exclusive source of pension and health-care benefits for United Mine Workers miners, retirees, and their dependents. See *Eastern Enters.*, 118 S. Ct. at 2138-2139. In the 1974 NBCWA, the UMWA and the BCOA agreed to separate that fund into two multi-employer pension funds and two multi-employer welfare benefit funds. Under the 1974 NBCWA, the 1950 Benefit Trust provided health-care benefits to miners who retired before 1976, and the 1974 Benefit Trust provided health-care benefits to both the active work force and to miners who retired in 1976 or thereafter. See *Eastern Enters.*, 118 S. Ct. at 2139. Unlike previous agreements, the 1974 NBCWA expressly stated that miners and their spouses would be entitled to health-care benefits for life. *Ibid.*; *In re Chateaugay Corp.*, 53 F.3d 478, 482 (2d Cir.) (quoting 1974

Agreement's provision that "[a]ny pensioned miner covered in this Plan will retain his Health Services card until death, and upon his death his widow will retain a Health Services card until her death or remarriage"), cert. denied, 516 U.S. 913 (1995).

The structure of the 1950 and 1974 Benefit Trusts was changed in the 1978 NBCWA. In that agreement, employers who were bound by the NBCWA (known as signatory operators) agreed to provide benefits to their active employees and future retirees through individual employer health plans, rather than the 1974 Benefit Trust. The 1974 Benefit Trust was retained as an "orphan" plan designed to provide health-care benefits to post-1975 retirees whose last employer had gone out of business. *Eastern Enters.*, 118 S. Ct. at 2140. The 1978 NBCWA, like the previous one, expressly promised that miners covered by the agreement would receive health-care benefits for life. *Chateaugay*, 53 F.3d at 482.

In the 1980s, the financial stability of the 1950 and 1974 Benefit Trusts was plagued by spiraling health-care costs, the practice of coal operators of "dumping" their retirees into the 1974 Benefit Trust by terminating their individual welfare benefit plans or leaving the coal business, and judicial decisions maintaining the trusts' beneficiary population without corresponding increases in coal operator contributions. The withdrawal of coal operators from the 1950 and 1974 Benefit Trusts forced the remaining participating employers to shoulder increasingly large contribution obligations to pay for not only their own retirees, but also newly "orphaned" retirees whose employers had ceased contributing to the Trusts. Those rising costs, in turn, influenced still-contributing signatory operators to withdraw from the Trusts, thus further shrinking the

trust fund contribution base. *Eastern Enters.*, 118 S. Ct. at 2140. The Trusts' ability to provide health-care benefits was jeopardized, and the issue of retiree health-care benefits contributed to a protracted strike at the Pittston Coal Company. *Ibid.*

2. In March 1990, the Secretary of Labor established the Advisory Commission on United Mine Workers of America Retiree Health Benefits (Coal Commission) to analyze the financial crisis confronting the Trusts and to recommend solutions. *Eastern Enters.*, 118 S. Ct. at 2140-2141. As relevant here, the Coal Commission recommended, as one alternative solution, that current and past signatories to the NBCWAs should bear the cost of providing health-care benefits to "orphaned" retirees whose former employers were no longer in the coal business, as well as to their own retirees. See *id.* at 2141. The Coal Act was based in large part on that alternative recommendation by the Coal Commission. See *ibid.*; 138 Cong. Rec. 5331 (1992) (statement of Sen. Wofford).

The Coal Act was designed to provide stable financing for the health-care benefits of all retired coal miners and their dependents who were covered by either the 1950 or 1974 Benefit Trust, or by an individual employer plan under the NBCWAs. To that end, the Coal Act creates two new, private multi-employer health-care benefit trusts. The first new fund, the United Mine Workers of America Combined Fund (Combined Fund), was the trust at issue in *Eastern Enterprises*; it is not at issue in this case. The Combined Fund was created by the statutory merger of the 1950 and 1974 United Mine Workers Benefit Trusts. It provides benefits to beneficiaries who were receiving (or were eligible to receive) benefits from those trusts as of July 1992. See 26 U.S.C. 9702.

The second fund, the 1992 United Mine Workers Benefit Plan (1992 Plan), is an entirely new entity, and is the fund at issue in this case. The 1992 Plan is designed to provide lifetime health-care benefits to individuals who should receive coverage under an individual employer plan but do not. See 26 U.S.C. 9712(b)(2)(B).[1] To provide financing for benefits under the 1992 Plan, the Coal Act assigns responsibility for funding the health-care benefits of a miner and his dependents to the signatory employer that most recently employed the miner. See 26 U.S.C. 9712(d).

The Coal Act directed the UMWA and the BCOA to create the 1992 Plan as a private multi-employer benefit plan and to appoint its trustees. 26 U.S.C. 9712(a)(1). The Coal Act further provides that the 1992 Plan has the same legal status as any other private multi-employer welfare benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) and the Labor Management Relations Act of 1947. 26 U.S.C. 9712(a)(2); see 29 U.S.C. 186(c)(5), 1002(1), 1002(37).

---

[1] The Coal Act elsewhere requires a mine operator who was providing health-care benefits to a miner or miner's dependents under an individual employer plan maintained under a 1978 or subsequent NBCWA, as of February 1, 1993, to continue to provide such benefits for as long as the operator remains in business. 26 U.S.C. 9711(a). If such an operator goes out of business or does not provide such benefits, a miner eligible to receive benefits from the operator's individual employer plan will receive benefits from the 1992 Plan. See 26 U.S.C. 9712(b)(2)(B). The 1992 Plan also provides health benefits to individuals who, but for the enactment of the Coal Act, would have been eligible to receive benefits under the 1950 or 1974 Benefit Trusts as of February 1993. See 26 U.S.C. 9712(b)(2)(A).

3. From the mid-1970s until 1984, petitioner Robert Coal Company managed and supervised the construction and operation of coal mines in Kentucky that were owned by Leslie Coal Mining Company and McInnes Coal Mining Company. During that period, Robert Coal employed all of the employees at the Leslie and McInnes mines. Some of those employees were miners who were members of, and represented by, the UMWA. Robert Coal Company became a signatory to the 1974, 1978, and 1981 NBCWAs. Pet. App. 9a.

In 1984, the assets of the Leslie and McInnes mines were sold to the Sidney Coal Company. In October 1984, the UMWA filed suit in the United States District Court for the Eastern District of Kentucky against several defendants, including Robert Coal, alleging that the sale of the Leslie and McInnes Mines to Sidney failed to comply with the successorship provisions of the applicable NBCWA. Pet. App. 9a. In May 1988, Robert Coal and the UMWA entered into a settlement agreement, by which Robert Coal agreed to continue providing health-care coverage to its retired miners and other beneficiaries from the Leslie and McInnes Mines until January 31, 1993. *Id.* at 42a-43a. The settlement agreement also stated that Robert Coal would have no responsibility for providing health-care benefits to those former employees after that date. *Id.* at 44a. The district court approved the settlement and entered an order dismissing the case with prejudice. *Id.* at 38a-40a.

From May 1988 through January 1993, Robert Coal provided health-care benefits to approximately 75 persons under the settlement agreement. Robert Coal ceased providing coverage in February 1993. Since that time, the 1992 Plan has provided health benefits to

those persons who previously had received such benefits from Robert Coal. Pet. App. 10a.

4. After the enactment of the Coal Act, the Trustees of the 1992 Plan requested, pursuant to the Act, that Robert Coal pay the premiums for the benefits of its retired employees and other beneficiaries covered under the NBCWAs. When Robert Coal refused to pay those premiums required under the Act, the Trustees filed this action in the United States District Court for the District of Columbia against Robert Coal and the other petitioners (who are "related persons" to Robert Coal within the meaning of the Coal Act, see 26 U.S.C. 9701(c)) to collect premium payments due the 1992 Plan under the Coal Act. Petitioners contended, in response, that the statutory obligation of coal mine operators to finance the 1992 Plan cannot be constitutionally applied to them because of the 1988 order terminating the Kentucky litigation. Petitioners also contended that the Coal Act violated the Due Process and Just Compensation Clauses of the Fifth Amendment and the Appointments Clause. The United States intervened to defend the constitutionality of the Act, pursuant to 28 U.S.C. 2403(a).

On November 17, 1997 (before this Court decided *Eastern Enterprises*), the district court rejected petitioners' constitutional challenges and granted summary judgment for respondents. The district court first rejected petitioners' argument that the Coal Act unconstitutionally disturbed the 1988 settlement and order terminating the Kentucky litigation. The court noted that "the Coal Act does not reimpose on Robert Coal the same obligation that it already satisfied through the settlement of the Kentucky lawsuit. Instead, the Coal Act creates future statutory liability and imposes a new and separate obligation on Robert

Coal." Pet. App. 14a. The court explained that "[t]he fact that the statutory obligations under the Coal Act are similar to or modeled on obligations created by earlier collective bargaining agreements does not mean they are 'arising out of' such earlier agreements, as the settlement agreement provides. By Robert Coal's logic, any entity operating in a highly regulated, national industry would be able to forever insulate itself from future Congressional regulation by settling a contract dispute in federal court." *Ibid.* The court therefore concluded that it need not deal at length with Robert Coal's argument that the Coal Act violates separation of powers principles by interfering with judicial power; because the Coal Act does not disturb the 1988 Kentucky judgment, the court reasoned, there has been no legislative interference with judicial powers. *Id.* at 13a-15a.

The district court also concluded that the liability imposed on petitioners by the Coal Act does not contravene the Fifth Amendment. The court observed that economic legislation "satisfies the requirements of due process so long as it is rationally related to a legitimate government purpose." Pet. App. 16a. It noted that Robert Coal "contributed to a reasonable expectation of lifetime health benefits" on behalf of its retired employees, *id.* at 18a-19a, and rejected petitioners' argument that the settlement agreement terminating the Kentucky litigation made their situation unique and conferred on them a constitutional immunity from the application of the Coal Act, *id.* at 19a. As for petitioners' claim that the Coal Act effected an uncompensated taking, the court sustained the Act under this Court's three-factor test, set forth in *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), for determining whether a regulatory mea-

sure gives rise to a taking. The court noted in particular that petitioners' obligations to the 1992 Plan are "reasonable and directly proportional to its liability under the previous funds," Pet. App. 21a, that Robert Coal had signed several NBCWAs which promised miners health benefits for life, *id.* at 21a-22a, and that the Coal Act does not appropriate private property to the benefit of the government itself, but rather readjusts private economic benefits and burdens, *id.* at 23a.

Finally, the district court rejected petitioners' challenge under the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, to the composition of the Board of trustees of the 1992 Plan. The court ruled that the trustees of the 1992 Plan are not "Officers of the United States" subject to the Appointments Clause because they hold no office or employment relationship with the federal government. Rather, the trustees are private individuals, and the Coal Act expressly provides the 1992 Plan is a "private plan." Pet. App. 25a; see 26 U.S.C. 9712(a)(1). "The 1992 Plan operates like any other private multiemployer benefit plan, differing only in that the obligation imposed on signatory operators to contribute stems from a statutory as opposed to contractual obligation." Pet. App. 25a. Although the trustees exercise significant authority, "what is relevant is that they do not exercise significant *governmental* authority." *Ibid.*

5. In an unpublished decision, the court of appeals affirmed "substantially for the reasons stated in the district court's memorandum opinion." Pet. App. 1a. The court of appeals further noted (*id.* at 2a) that its recent decision in *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) *(ABC)*, "provides further support for the district

court's holding." In the *ABC* case, the court of appeals rejected a due process challenge brought by companies that had been signatories to the 1974 and 1978 NBCWAs to their statutory obligation under the Coal Act to contribute to the Combined Fund, see *ABC*, 156 F.3d at 1255-1258, and held that the structure of the Combined Fund "constituted a rational legislative scheme to ensure that the cost of providing health benefits be placed on the operators that had created the expectation of those benefits." Pet. App. 2a. In this case, the court found "no constitutionally significant difference between the Combined Fund and the 1992 Benefit Plan." *Ibid.*

The court then noted petitioners' argument that "the trustees of the 1992 Benefit Plan are essentially tax assessors and currently exercise their functions in violation of the Appointments Clause." Pet. App. 2a. The court suggested that the "core" of this argument, "as elaborated at oral argument, is that the Congress cannot delegate its taxing power to a private entity." *Ibid.* The court declined to address that argument, because it concluded that "the parties did not raise or argue the non-delegation doctrine in this appeal." *Ibid.*

Finally, the court rejected petitioners' claim that the Coal Act effected an unconstitutional taking. Pet. App. 3a. The court stated that, in *Eastern Enterprises*, "five justices determined that the Takings Clause was not the proper paradigm for analyzing the Act's retroactive effects on coal operators." *Ibid.* (citing *Eastern Enters.*, 118 S. Ct. at 2155-2158 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 2161-2164 (Breyer, J., dissenting)).

ARGUMENT

1. Petitioners contend (Pet. 10-16) that the obligations imposed on them under the Coal Act to finance the health-care benefits of their former employees (and the employees' dependents) violate the Due Process and Just Compensation Clauses of the Fifth Amendment. They contend, in particular, that the court of appeals improperly refused to follow *Eastern Enterprises* v. *Apfel*, 118 S. Ct. 2131 (1998), which held the Coal Act unconstitutional as applied to the coal mine operator that challenged the Act in that case. Those contentions are without merit. Petitioners' situation is fundamentally different from the position of the coal operator before the Court in *Eastern Enterprises*, because, unlike that operator, petitioner Robert Coal Company signed collective bargaining agreements that expressly promised its employees health-care benefits for life. The decision below therefore creates no inconsistency with *Eastern Enterprises*. The result reached by the courts below is also correct under well-settled just compensation and due process principles, and it does not conflict with any decision of any other court of appeals. Further review is therefore not warranted.

a. In *Eastern Enterprises*, a divided Court held that the Coal Act was unconstitutional as applied to a coal mine operator that signed NBCWAs in effect between 1947 and 1964, but ceased coal mining operations in 1965. See *Eastern Enters.*, 118 S. Ct. at 2142-2143 (plurality opinion) (recounting the history of Eastern's involvement in the coal business). The Coal Act obligated Eastern to pay premiums to the Combined Fund to cover the health benefits of more than 1000 retired miners who had worked for the company before 1966, and their dependents. *Id.* at 2143 (plurality opinion).

Eastern alleged that the Coal Act violated substantive due process as applied to it and effected an unconstitutional taking of its property without just compensation by retroactively creating an obligation to finance the benefits of miners who, when employed by Eastern, had no expectation that they would receive open-ended health-care benefits at Eastern's expense. *Ibid.*

The plurality concluded that the application of the Coal Act to Eastern effected an unconstitutional taking without just compensation. See 118 S. Ct. at 2146-2153. Applying the Court's three-factor test for analyzing regulatory taking claims (*id.* at 2149-2153), the plurality found a constitutional problem as to each factor. In particular, the plurality found it significant that the Coal Act imposed liability on Eastern for lifetime health-care benefits even though Eastern had withdrawn from the coal industry before any of the NBCWAs had promised lifetime benefits to the miners. See *id.* at 2150 (with respect to the burden placed on Eastern, noting that Eastern "had no control over the activities of its former employees subsequent to its departure from the coal industry in 1965"); *id.* at 2152 (with respect to investment-backed expectations, stressing that Eastern never participated in an industry-wide agreement creating expectations of lifetime benefits); *id.* at 2152-2153 (with respect to the nature of the governmental action at stake, stating that "Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised").

Justice Kennedy, concurring in the judgment and dissenting in part, disagreed with the plurality's conclusion that the Coal Act should be analyzed as a taking, see 118 S. Ct. at 2154-2158, but concluded that the application of the Coal Act to Eastern violated

"accepted principles" of substantive due process inhibiting the operation of severely retroactive laws, *id.* at 2158-2160. Justice Kennedy noted that "the imposition of liability on former employers based on past employment relationships" may be upheld under due process principles as remedial legislation designed to allocate properly the costs of the employer's business. *Id.* at 2159. He concluded, however, that the Coal Act did not serve that purpose as applied to Eastern because, although "Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1964 Plans which put the benefits in jeopardy. * * * [T]he expectation was created by promises and agreements made long after Eastern left the coal business." *Ibid.*

Four Justices dissented, and concluded that the Coal Act, as applied to Eastern, was not unconstitutional under either due process principles or just compensation principles. *Eastern Enters.*, 118 S. Ct. at 2161-2168. The four dissenters also agreed with Justice Kennedy that the Coal Act should not be analyzed as a taking at all. *Id.* at 2161-2164.

b. Although the Court in *Eastern Enterprises* did not arrive at a single rationale for finding the Coal Act unconstitutional as applied to Eastern, both opinions supporting the judgment in that case emphasized the fact that Eastern left the coal industry before any collective bargaining agreement gave miners an expectation of lifetime health-care benefits. This case, by contrast, presents a factual situation in which the coal operator signed NBCWAs promising its employees lifetime benefits. The result reached by the Court in *Eastern Enterprises* therefore does not govern here.

To the contrary, as the court of appeals observed in its earlier decision in *Association of Bituminous Contractors* v. *Apfel*, 156 F.3d 1246 (D.C. Cir. 1998), both the plurality and Justice Kennedy accepted in *Eastern Enterprises* that the 1974 and subsequent NBCWAs "created an expectation of lifetime benefits that the employers who participated in those agreements were responsible for creating." 156 F.3d at 1256. Thus, "the clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability." *Id.* at 1257; see also *Unity Real Estate Co.* v. *Hudson*, No. 97-3234, 1999 WL 167765, at *9 (3d Cir. Mar. 29, 1999), ("Language in the plurality and the concurrence [in *Eastern*] suggest[s] that expectations fundamentally changed after 1974.").[2]

Petitioners are incorrect in contending (Pet. 13-14) that the court of appeals' reliance on the plurality opinion and Justice Kennedy's opinion in *Eastern Enterprises* to reject their due process challenge is inconsistent with *Marks* v. *United States*, 430 U.S. 188 (1977). *Marks* addresses the situation where a concurring opinion in this Court reaches the same result as that reached by a plurality of the Justices, but on narrower grounds. In that situation, a lower court should follow the reasoning of the concurring opinion,

---

[2] Moreover, while the Coal Act required Eastern to begin paying premiums to the Combined Fund in 1993, even though the company had not contributed to the United Mine Workers Benefit Plans since 1965, the Act requires Robert Coal to finance (through premiums to the 1992 Plan) the health benefits of retirees who were covered by that company through January 31, 1993. See p. 6, *supra*; 26 U.S.C. 9712(b)(2) and (d)(3); cf. *Eastern Enters.*, 118 S. Ct. at 2150-2151.

because the lower court may conclude that a majority of this Court agrees with the narrower position reached by the concurrence. *Id.* at 193. To the extent that *Marks* provides any guidance here, it supports the court of appeals' rejection of petitioners' due process challenge. Even though the plurality and concurrence in *Eastern Enterprises* analyzed that case under different legal frameworks, those opinions agreed on the constitutional significance of a particular fact, namely, that Eastern left the coal indusry before 1974, when the NBCWAs began expressly stating that retired miners would receive health benefits for life. Both the plurality and Justice Kennedy concluded that the crucial constitutional problem in *Eastern Enterprises* was the Coal Act's application to an operator that had never signed a wage agreement promising lifetime benefits, and both found that situation distinguishable from the one where an operator had signed such an agreement. See pp. 11-13, *supra*.

Petitioners argue further (Pet. 13-15) that *Marks* does not support the court of appeals' rejection of its challenge to the application of the Coal Act as a taking without just compensation. They argue that, even though Justice Kennedy and the four dissenting Justices in *Eastern Enterprises* agreed that the Coal Act should not be analyzed as a taking at all, *Marks* does not permit a lower court to combine a concurrence and a dissent into a controlling majority of this Court. This case, however, does not present an appropriate circumstance for the Court to decide whether a concurrence and a dissent in a decision without a single opinion joined by a majority of the Court may be combined to form a "*Marks* majority." For the reasons given above, petitioners' taking claim fails under the reasoning of the plurality opinion in *Eastern Enter-*

prises, which emphasized that Eastern—unlike the coal companies that signed the 1974 and later NBCWAs—never contributed towards any reasonable expectation of lifetime health benefits on the part of coal miners. On the question of a taking, therefore, the plurality opinion and Justice Kennedy's concurrence form a "*Marks* majority" sufficient to reject petitioners' claim, and it is not necessary to rely on the dissenting opinion in *Eastern Enterprises*.[3]

2. Petitioners contend (Pet. 16-20) that the Coal Act as applied to them violates the doctrine of separation of powers because it supposedly nullifies a district court judgment entered after petitioners settled private litigation against the UMWA concerning health-care benefits for its employees. That contention is without merit.

The 1988 resolution of the Kentucky litigation determined the extent of Robert Coal Company's contractually based responsibility under its collective bargaining agreements with the UMWA. The union had sued Robert Coal and others, alleging that the sale of the assets of the Leslie and McInnes Mines had violated successorship clauses in the 1981 and 1984 collective bargaining agreements. See Pet. App. 9a. Robert Coal and the other defendants in that action did not admit any liability, but they settled the dispute by agreeing to pay for health benefits for certain retired miners

---

[3] Because this case is materially different from *Eastern Enterprises*, there is no merit to petitioners' contention (Pet. 15) that the court of appeals' decision conflicts with *Mary Helen Coal Corp.* v. *Hudson*, 164 F.3d 624 (4th Cir. 1998) (Table). In that case, the Fourth Circuit ruled, in an unpublished decision, that the Coal Act was unconstitutional as applied to a company that was "materially indistinguishable from Eastern." *Mary Helen Coal Corp.* v. *Hudson*, No. 97-2331, 1998 WL 708637, at *1 (Sept. 24, 1998).

through January 1993. See *id.* at 9a, 42a-47a. In particular, the settlement agreement released Robert Coal from any duty to provide further benefits "arising out of any Wage Agreement." *Id.* at 44a. The district court in Kentucky then approved the settlement and dismissed the case with prejudice. See *id.* at 40a.

The Coal Act does not "nullify" or alter the effect of the settlement agreement entered in the Kentucky litigation, for it "does not reimpose on Robert Coal the same obligation that it already satisfied through the settlement of the Kentucky lawsuit. Instead the Coal Act creates future statutory liability and imposes a new and separate obligation on Robert Coal." Pet. App. 14a. As the district court explained (*ibid.*): "There is no question that the settlement agreement terminated Robert Coal's *contractual* obligation to contribute to the [United Mine Workers] 1950 and 1974 Benefit Plans as of January 1993. The Coal Act, however, imposes a *statutory* obligation on Robert Coal to contribute to the new Combined Fund [*sic*: 1992 plan] as of February 1993."

The crucial difference between contractual and statutory obligations explains why *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), on which petitioners rely (see Pet. 17-20), does not govern this case. *Plaut* involved an amendment to the securities laws passed by Congress to require the federal courts to reinstate private securities actions that had previously been dismissed as time-barred based on this Court's interpretation of the applicable statute of limitations. This Court held in *Plaut* that Congress's direction to the federal courts to reopen and rehear cases that had been litigated to final judgment violated the doctrine of separation of powers because "it does no more and no less than reverse a determination once made, in a

particular case." 514 U.S. at 225 (internal quotation marks omitted). The Court explained that "Congress may not declare by retroactive legislation that the law applicable to *that very case* was something other than what the courts said it was." *Id.* at 227.

The Coal Act's application to petitioners does not implicate the constitutional concerns expressed in *Plaut*. Congress did not compel any court to reopen, readjudicate, or otherwise disturb the Kentucky settlement or judgment. Nor did Congress require the federal courts to apply different law in the Kentucky litigation between Robert Coal and the UMWA than the law that the courts had previously applied. Indeed, the Coal Act does not concern the law applied in the Kentucky litigation at all. Rather, Congress enacted an entirely new statutory scheme that imposed a new form of liability on petitioners.[4] Moreover, petitioners' funding obligation under the Coal Act runs not to the UMWA, which was the plaintiff in the Kentucky litigation, but to a different entity, the 1992 Plan. That funding obligation therefore does not offend the separation of powers.

3. Petitioners argue (Pet. 20-24) that the trustees of the 1992 Plan were appointed in violation of the Appointments Clause of the Constitution (Art. II, § 2, Cl. 2). The court of appeals declined to address that issue, for it concluded that the Appointments Clause

---

[4] Contrary to petitioners' assertions (Pet. 19), the fact that Robert Coal's statutory obligations under the Coal Act are similar to its obligations under the previous collective bargaining agreements and court-approved settlement agreement is irrelevant. As the district court recognized, that logic, if adopted, would allow "any entity operating in a highly regulated, national industry" to "forever insulate itself from future Congressional regulation by settling a contract dispute in federal court." Pet. App. 14a.

claim had not been adequately preserved on appeal. Pet. App. 2a. Petitioners argue that they did properly preserve their Appointments Clause claim. The claim in any event does not warrant further review, for the district court correctly ruled that the Coal Act is consistent with that Clause. *Id.* at 24a-25a.

Petitioners' argument that the trustees must be appointed pursuant to the Appointments Clause is based on a misreading of the Court's statement in *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam), that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause.]" Petitioners note that the Coal Act authorizes the trustees to administer the 1992 Plan and to sue to recover on coal operators' obligations to the 1992 Plan under the Coal Act; they assert that such responsibilities constitute the exercise of "significant government authority" that may be exercised only by properly appointed Officers of the United States. Pet. 22. That argument fails because the Appointments Clause does not address Congress's power to assign functions to *private* entities or the manner in which officers of such entites may be selected. The Clause governs only the manner of selection of "Officers *of the United States.*" U.S. Const. Art. II, § 2, Cl. 2 (emphasis added).

In *Buckley*, the Court invalidated provisions of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431 *et seq.*, that provided for congressional appointment of members of the Federal Election Commission, a federal agency with responsibility for administering and enforcing the FECA. See 424 U.S. at 109-143. But *Buckley* does not stand for the proposition that every individual who exercises significant

authority within a legal framework created by Congress is transformed into an "Officer of the United States" within the meaning of the Appointments Clause. Rather, an "Officer of the United States" is one who exercises significant authority on behalf of the United States government and who has a continuing and formalized relationship of employment with the United States Government. See *Auffmordt* v. *Hedden*, 137 U.S. 310, 327 (1890) (merchant appraiser was not an "Officer" for purposes of the Appointments Clause because his position was without tenure, duration, continuing emolument, or continuous duties); *United States* v. *Germaine*, 99 U.S. 508, 511-512 (1878) (surgeon appointed by Commissioner of Pensions was not an "Officer" because his duties were not continuing and permanent); *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868) ("An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties. The employment of the defendant was in the public service of the United States."). And Congress has frequently created private entities with significant responsibilities under federal statutes, such as government-sponsored private corporations, without requiring that officers and directors of those entities be appointed pursuant to the Appointments Clause. See, *e.g.*, 12 U.S.C. 1723(b) (14 of 18 directors of Federal National Mortgage Association elected by common stockholders); 20 U.S.C. 1087-2(c) (similar; Student Loan Marketing Association); see also Act of Feb. 25, 1791, ch. 10, § 4, 1 Stat. 192-193 (providing for election of directors of Bank of the United States by stockholders).

The trustees of the 1992 Plan do not fall within the Appointments Clause because they do not hold any

office or employment relationship with the United States Government. The Coal Act expressly provides that the 1992 Plan is a "private plan." 26 U.S.C. 9712(a)(1). The Act further provides that the 1992 Plan has the same legal status as any other private multi-employer welfare benefit plan under the Employee Retirement Income Security Act and the Labor Management Relations Act. 26 U.S.C. 9712(a)(2). Once established, the 1992 Plan operates like any other private multi-employer benefit plan; it substantively differs from other plans only in that the obligation of signatory operators to contribute derives from statutory command rather than contractual agreement. Thus, the Coal Act does not create a "public station" or "employment" (*Hartwell*, 73 U.S. (6 Wall.) at 393), and the trustees do not hold federal office any more than do the trustees of any other private multi-employer benefit plan.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DOUGLAS N. LETTER
MARK B. STERN
KATHLEEN MORIARTY MUELLER
Attorneys

APRIL 1999

Supreme Court, U.S.
FILED
APR 19 1999
OFFICE OF THE CLERK

No. 98-1311

In the Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT COAL COMPANY, *et al.*,
Petitioners,

v.

MICHAEL HOLLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS UMWA 1992 BENEFIT PLAN AND ITS TRUSTEES

JOHN R. MOONEY
MARILYN L. BAKER
MOONEY, GREEN, BAKER, GIBSON & SAINDON, P.C.
700 14th Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 783-0010

PETER BUSCEMI
Counsel of Record
MITCHELL J. MATORIN
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

DAVID W. ALLEN
CHRISTOPHER CLARKE
Office of the General Counsel
UMWA HEALTH AND RETIREMENT FUNDS
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 895-3737

Counsel for Respondents UMWA 1992 Benefit Plan and its Trustees

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

33pp

QUESTIONS PRESENTED

1. Whether Robert Coal's broad constitutional challenge to the Coal Act under the Due Process Clause and the Takings Clause was properly preserved in the courts below.

2. Whether, assuming the issue is properly before the Court, the Coal Act as applied to Robert Coal, a signatory of the 1974, 1978, and 1981 National Bituminous Coal Wage Agreements, violates the Due Process Clause or the Takings Clause of the Fifth Amendment.

3. Whether Robert Coal's 1988 settlement of a private contractual dispute with the United Mine Workers of America creates some separation-of-powers barrier to the imposition of statutory liability under the Coal Act for health care in 1993 and later years.

4. Whether the Settlors and Trustees of the United Mine Workers of America 1992 Benefit Plan are "Officers of the United States" for purposes of the Appointments Clause.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
A. The Coal Act	1
B. Robert Coal's Involvement In The Coal Industry	3
C. The Kentucky Litigation And Settlement Agreement	4
D. The Litigation Below	5
ARGUMENT	9
I. ROBERT FAILED TO PRESERVE THE DUE PROCESS AND TAKINGS CLAUSE ARGUMENTS IT RAISES FOR THE FIRST TIME IN ITS PETITION	9
II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *EASTERN ENTERPRISES*	11
III. THE COURT OF APPEALS CORRECTLY HELD THAT THE COAL ACT DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES	21
IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE SETTLORS AND TRUSTEES OF THE 1992 BENEFIT PLAN ARE NOT "OFFICERS OF THE UNITED STATES" FOR PURPOSES OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION	24
CONCLUSION	29

TABLE OF AUTHORITIES

FEDERAL CASES — Page

Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246 (D.C. Cir. 1998) ..2, 9, 14, 16, 17, 20
Bellaire Corp. v. Shalala, 995 F. Supp. 125 (D.D.C. 1997) 9
In re Blue Diamond Coal Co. (Blue Diamond Coal Co. v. Shalala), 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997) 2
Buckley v. Valeo, 424 U.S. 1 (1976) 25, 27, 28
In re Chateaugay Corp. (LTV Steel Co. v. Shalala), 53 F.3d 478 (2d Cir.), *cert denied*, 516 U.S. 913 (1995) 2, 9
Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993) 22
Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986) 13, 22
Davon, Inc. v. Shalala, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996) 2
Eastern Enterprises v. Apfel, 524 U.S. 498, 118 S. Ct. 2131 (1998) .....*passim*
Fleming v. Rhodes, 331 U.S. 100 (1947) 22
Freytag v. Commissioner of Internal Revenue, 501 U.S. 868 (1991) 28
Ex Parte Hennen, 38 U.S. (13 Pet.) 225 (1839) 28
Holland v. Keenan Trucking Co., 102 F.3d 736 (4th Cir. 1996) 2, 23
King v. Palmer, 950 F.2d 771 (D.C. Cir. 1991) 17
Marks v. United States, 430 U.S. 188 (1977) 17
Mary Helen Coal Corp. v. Hudson, 976 F. Supp. 366 (E.D. Va. 1997) 21
Mary Helen Coal Corp. v. Hudson, 1998 WL 708687 (4th Cir. Sept. 24, 1998) 20
Morrison v. Olson, 487 U.S. 654 (1988) 28
Myers v. United States, 272 U.S. 52 (1926) 28
Norman v. Baltimore & Ohio R. Co., 294 U.S. 240 (1935) 13, 21, 22

TABLE OF AUTHORITIES—Continued

	Page
In re Olga Coal Co., 159 F.3d 62 (2d Cir. 1998)	16
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)	21, 24
Rappa v. New Castle County, 18 F.3d 1043 (3d Cir. 1994)	17
Ex Parte Siebold, 100 U.S. 371 (1880)	28
United States v. Germaine, 99 U.S. 508 (1878)	24, 25
United States v. Hartwell, 73 U.S. 385 (1867)	24, 25
Unity Real Estate Co. v. Hudson, 1999 WL 167765 (3d Cir. March 29, 1999)	2, 9, 13, 14, 16, 17, 20
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	22
Weiss v. United States, 510 U.S. 163 (1994)	28

FEDERAL STATUTES

26 U.S.C. § 9701(b)(2)	25
26 U.S.C. § 9702(a)(3)	2
26 U.S.C. § 9703(f)	3
26 U.S.C. § 9708	22
26 U.S.C. § 9711	3
26 U.S.C. § 9712(a)(1)	25, 27
26 U.S.C. § 9712(a)(2)	2, 25
26 U.S.C. § 9712(b)(2)	3, 26
26 U.S.C. § 9712(c)(1)	27
26 U.SC. § 9712(c)(2)	26
26 U.S.C. § 9712(c)(3)	26
26 U.S.C. § 9712(d)(1)	26, 27
26 U.S.C. § 9712(d)(2)(B)	27
26 U.S.C. § 9712(d)(3)	3, 5, 26, 27
29 U.S.C. § 186(c)(5)	2
29 U.S.C. § 1002(1)	2
29 U.S.C § 1002(37)	2

MISCELLANEOUS

Communications Satellite Corporation, 42 Op. Att'y Gen. 165 (1962)	25

In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1311

ROBERT COAL COMPANY, *et al.*,
Petitioners,

v.

MICHAEL HOLLAND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS UMWA 1992 BENEFIT PLAN AND ITS TRUSTEES

STATEMENT OF THE CASE

It is, of course, highly implausible that a single court of appeals panel would, as petitioners assert, disregard "no fewer than three of this Court's landmark constitutional decisions." (Pet. 10.) Like most highly implausible assertions, this one is false. Petitioners' repeated protests against "evisceration" of this Court's precedents bear witness primarily to petitioners' own overblown rhetoric rather than any error by the court of appeals. Once the melodrama is laid aside, this case is revealed for what it really is: a parochial effort by a former coal operator to use the happenstance of an earlier contractual settlement as a shield against future statutory liability. The case presents no issue that warrants review in this Court.

A. The Coal Act

The several opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998), addressed at some length the historical background of the Coal Industry

Retiree Health Benefit Act of 1992 (the "Coal Act").[1] We summarize that background only briefly here.

In the Coal Act, Congress sought to resolve a financial crisis that plagued the existing collectively bargained multiemployer health care system for retired coal miners and their dependents. Rather than leaving the subject to the vagaries and potential disruptions of future collective bargaining, Congress provided that eligible beneficiaries under the statute would receive health coverage either from their former employers' individual employer plans (the continuation of which the statute required) or from one of two new trust funds to be created in accordance with the statute. Both of these new funds, the United Mine Workers of America Combined Benefit Fund ("Combined Fund") and the United Mine Workers of America 1992 Benefit Plan ("1992 Plan"), were expressly required to be private plans of the kind described in Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. § 186(c)(5), "employee welfare benefit plans" within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(1), and "multiemployer plans" within the meaning of Section 3(37) of ERISA, 29 U.S.C. § 1002(37). 26 U.S.C. §§ 9702(a)(3), 9712(a)(2). The 1992 Plan, which is at issue in this case, generally provides benefits for those retirees and their dependents who, but for the enactment of the Coal Act, would be eligible to receive bene-

---

[1] Numerous court of appeals decisions, both before and after *Eastern*, have addressed the same history. *See, e.g., Unity Real Estate Co. v. Hudson*, 1999 WL 167765 (3d Cir. March 29, 1999); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) (*"ABC"*); *Davon, Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996); *In re Blue Diamond Coal Co. (Blue Diamond Coal Co. v. Shalala)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 682 (1997); *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996); *In re Chateaugay Corp. (LTV Steel Co. v. Shalala)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995).

fits from the pre-Coal Act 1950 UMWA Benefit Plan or 1974 UMWA Benefit Plan, based upon their age and service as of February 1, 1993. The 1992 Plan also provides benefits for those persons who are entitled to receive coverage from an individual employer plan under 26 U.S.C. § 9711, but who do not actually receive such coverage.[2] 26 U.S.C. § 9712(b)(2).

The 1992 Plan is funded through the assessment of premiums against employers whose retirees are receiving health coverage from the 1992 Plan under 26 U.S.C. § 9712 or from an individual employer plan under 26 U.S.C. § 9711. As pertinent here, the Coal Act provides that the coal industry employer that was a signatory to a National Bituminous Coal Wage Agreement ("NBCWA") and who last employed a particular retiree in the coal industry is responsible for paying monthly premiums for each such retiree who is a beneficiary of the 1992 Plan. 26 U.S.C. § 9712(d)(3).

B. Robert Coal's Involvement In The Coal Industry

Pursuant to management agreements with Leslie Coal Mining Company ("Leslie") and McInnes Coal Mining Company ("McInnes"), petitioner Robert Coal Company ("Robert") agreed to manage and supervise the construction, development, and operation of the Leslie and McInnes Mines in Pike County, Kentucky. Robert entered into its agreement with Leslie on January 1, 1974, and it entered into its agreement with McInnes on January 1, 1976. From the date of the respective management agreements until 1984, Robert employed all of the employees at the Leslie and McInnes Mines. (Pet. App. 9a.) Robert

---

[2] The Combined Fund provides benefits for those retirees and their dependents who, as of July 20, 1992, were eligible to receive and were receiving benefits from the pre-Coal Act 1950 UMWA Benefit Plan or 1974 UMWA Benefit Plan. 26 U.S.C. § 9703(f). The Combined Fund is not at issue in this case.

was a signatory to the 1974, 1978, and 1981 NBCWAs. (Pet. App. 6a.)

Coal production at the Leslie and McInnes Mines ended in February 1983. Robert continued to maintain the Leslie and McInnes Mines until September 30, 1984, at which time the management agreements with Leslie and McInnes were terminated, and the mines sold. *Id.*

C. The Kentucky Litigation And Settlement Agreement

Shortly after the mines were sold, the United Mine Workers of America ("UMWA") filed suit in the United States District Court for the Eastern District of Kentucky against Robert, Leslie, and McInnes (the "Kentucky litigation"). The UMWA alleged that the sale of the mines violated the successorship provisions of the NBCWAs because the sellers had failed to obtain the purchaser's commitment to assume Robert's benefit funding obligations under the NBCWAs.

In May 1998, Robert and the UMWA entered into a settlement agreement ("the Settlement Agreement"). (Pet. App. 9a-10a, 41a). Under the Settlement Agreement, Robert agreed to continue providing health care coverage to its retirees until January 31, 1993 "in the same manner and amounts" as set forth in the 1984 NBCWA. (Pet. App. 43a.) In return, the UMWA waived any claim that Robert and its affiliates "were or are now bound by the 1988 Wage Agreement at the former Leslie and McInnes Mines at any time." *Id.* The Settlement Agreement further provided that, after January 31, 1993, Robert would not have any obligation to provide to its former employees or their dependents "any health or other non-pension benefits, arising out of any Wage Agreement . . . ." (Pet. App. 44a.)

As part of the Settlement Agreement, the parties entered into a Stipulation and Order of Dismissal With Prejudice ("the Stipulated Order"), which the district court approved

on May 27, 1988. (Pet. App. 38a.) Robert refers to the Settlement Agreement and Stipulated Order collectively as the "final judgment." Contrary to Robert's claim, however, the Stipulated Order entered by the court in the Kentucky litigation did not "expressly approve[] and incorporate[] by reference" the Settlement Agreement. (Pet. 4.) Rather, it simply noted that the court had been "duly advised of" and had previously approved the Settlement Agreement, and the Settlement Agreement was attached as an exhibit to the Stipulated Order. (Pet. App. 40a.) Nor, as Robert asserts, did the Stipulated Order "specifically decree" that Robert would have no obligation to provide any health benefits "arising out of any Wage Agreement" in the future. (Pet. 4.) Rather, it was the Settlement Agreement that so provided. (Pet. App. 44a.) Finally, Robert incorrectly asserts that it "satisfied all of its obligations under the Kentucky final judgment" (Pet. 4); in fact, the Stipulated Order imposed no obligations at all on Robert. Rather, Robert's obligations arose under the Settlement Agreement.

From May 1988 until January 31, 1993, Robert provided benefits to approximately 76 persons pursuant to the terms of the Settlement Agreement. In December 1992, Robert informed each of the beneficiaries receiving benefits under the Settlement Agreement that it would stop providing these benefits after January 31, 1993.

D. The Litigation Below

After enactment of the Coal Act, the 1992 Plan provided health benefits to the retirees previously employed by Robert at the Leslie and McInnes Mines. (Pet. App. 10a.) In accordance with the Coal Act, the Trustees assessed Robert monthly premiums for each beneficiary of the 1992 Plan for whom Robert was the last signatory operator to employ the retiree in question. 26 U.S.C. § 9712(d)(3). When Robert refused to pay the premiums, the Trustees sued. (Pet. App. 4a.) The United

States intervened in support of the Trustees. The Trustees and Robert each moved for summary judgment. Relying on the Settlement Agreement and Stipulated Order as the basis for its arguments, Robert asserted several constitutional grounds for its "as applied" challenge to the validity of the Coal Act. In particular, Robert argued that, because of its prior settlement with the UMWA, the Coal Act is invalid under the Due Process and Takings Clauses of the Fifth Amendment, the separation-of-powers doctrine, and the "vested rights doctrine." Robert also contended that the Coal Act is facially unconstitutional due to an alleged violation of the Appointments Clause. After full briefing, the district court granted summary judgment for the Trustees. (Pet. App. 5a.)

In its petition in this Court, Robert attempts to create the impression that it pursued in the courts below broad-based Due Process and Takings Clause challenges to the Coal Act, in terms generally applicable to post-1974 NBCWA signatories. Robert states, for example, that the district court rejected its claim that the Coal Act "violates the Fifth Amendment Takings and Due Process Clauses," and that the court ruled "[w]ithout the benefit of" this Court's decision in *Eastern* and "relied heavily" on several court decisions that are "inconsistent" with *Eastern*. (Pet. 7-8.) But Robert's arguments in the district court and in the court of appeals were far narrower than the petition suggests, and Robert expressly disclaimed reliance on *Eastern* in the court of appeals.

In the district court, Robert's due process and takings claims revolved exclusively around the rights that Robert purportedly obtained as a result of the Settlement Agreement and the Stipulated Order. For example, in support of its takings claim, Robert argued in its motion for summary judgment that:

> Any interpretation, application or enforcement of the 1992 Coal Act that serves to annul, nullify or take

> away the right obtained by Robert through the Final Judgment constitutes an unlawful Taking of property in violation of the Fifth Amendment, as applied to Robert.

(Robert's Memorandum of Law in Support of Its Motion for Summary Judgment, October 31, 1994, at 27) ("Robert Summary Judgment Motion"). In its opposition to the Trustee's motion for summary judgment, Robert similarly argued that:

> the attempted application of the Act to Robert constitutes a complete destruction or taking of the absolute and vested right obtained by Robert in the Kentucky Lawsuit discharging or terminating any such liability after January 31, 1993.

(Robert's Opposition to Trustees' Memorandum in Support of Their Motion for Summary Judgment, December 6, 1994, at 25-26) ("Robert Opposition").

Likewise, Robert's due process arguments in the district court revolved entirely around the impact of the Coal Act on Robert's purported rights under the Settlement Agreement and Stipulated Order. Thus, Robert conceded the Trustees' recitation of the "general propositions of law" applicable to due process claims, but contended that those propositions were "inapplicable to the instant case because they do not involve a due process inquiry based on a fact that is crucial here, *i.e.*, the fact that Robert Coal has rights obtained pursuant to a Final Judgment." (Robert Opposition at 20); *see also* Robert Summary Judgment Motion at 38-39 (arguing that Coal Act was arbitrary and irrational as applied to Robert because of the rights Robert purportedly obtained as a result of the Settlement Agreement and Stipulated Order).

Robert did not argue that the Coal Act violated its rights under the Due Process and Takings Clauses for any reason other than the effect the law allegedly had on the Settlement Agreement and Stipulated Order. Robert expressly distinguished its case from others upholding

the constitutionality of the Coal Act because, unlike the claims in those cases, Robert's claim turned exclusively on the rights that Robert allegedly obtained as a result of the Settlement Agreement and Stipulated Order. The district court correctly held that the Settlement Agreement and Stipulated Order provided no basis for holding the Coal Act unconstitutional as applied to Robert. (Pet. App. 13a-24a.)

After the district court's decision, but before briefing had commenced in the court of appeals, this Court issued its decision in *Eastern*.[3] Again, however, Robert focused its takings and due process claims exclusively on the effect of the Coal Act on its purported rights under the Settlement Agreement and Stipulated Order. (*See* Brief of Appellants (Robert), June 29, 1998, at 28, 36.)

Robert was fully aware of this Court's decision in *Eastern* when it filed its briefs in the court of appeals. In fact, Robert expressly distinguished this case from *Eastern*. (Brief of Appellants at 32.) Robert then argued that *Eastern* was nevertheless "relevant to" Robert's takings argument. Once again, however, Robert focused only on the impact of the Coal Act on the Settlement Agreement and Stipulated Order. *E.g.*, *id.* at 34 ("Robert Coal had legitimate settled expectations based on the Final Judgment which were unfairly upset by the Trustees' attempt to enforce the Coal Act as to it.").

Robert did not even mention *Eastern* in its due process arguments before the court of appeals. Nor, for that matter, did Robert cite that decision even once in its reply brief before that court, in support of either its takings or due process arguments. It is little wonder, then, that the court of appeals saw no need to expound upon the impact of *Eastern* on Robert's situation. Instead, after full brief-

---

[3] *Eastern* was decided on June 25, 1998. Robert filed its initial brief before the court of appeals on June 29, 1998, and filed its reply brief on August 21, 1998.

ing and oral argument, the court of appeals affirmed the district court's decision "substantially for the reasons stated in the district court's memorandum opinion." (Pet. App. 1a.)

ARGUMENT

I. ROBERT FAILED TO PRESERVE THE DUE PROCESS AND TAKINGS CLAUSE ARGUMENTS IT RAISES FOR THE FIRST TIME IN ITS PETITION

The first issue presented in Robert's petition displays a stark discontinuity with Robert's submissions in the district court and in the court of appeals.[4] In its petition, Robert argues that the court of appeals erred in "holding" that this Court's decision in *Eastern* "established only a 'specific result' not binding in any other cases." (Pet. i.) As we demonstrate below, the court of appeals held no

---

[4] Counsel of record for petitioners in this Court was not counsel below. He has, however, recently appeared as counsel for LTV Corporation and North American Coal Company as *amici curiae* in other cases raising unsuccessful challenges to the validity of the Coal Act. *Unity Real Estate Co. v. Hudson*, 1999 WL 167765 (3d Cir. March 29, 1999); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) ("*ABC*"). LTV and North American failed long ago in their own attacks on the constitutionality of the Coal Act. *In re Chateaugay Corp. (LTV Steel Co. v. Shalala)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995); *Bellaire Corp. v. Shalala*, 995 F. Supp. 125 (D.D.C. 1997) (Bellaire is a North American subsidiary). Since this Court's decision in *Eastern*, LTV and North American have sought to use other cases as vehicles to reprise their general assault against the Coal Act as applied to post-1974 NBCWA signatories. In each of these cases, LTV and North American have sought to convert narrower attacks on the statute into broader challenges akin to those that LTV and North American unsuccessfully pursued on their own behalf in the past. Both the Third Circuit and the D.C. Circuit have rejected these efforts. *Unity*, 1999 WL 167765 at *9; *ABC*, 156 F.3d at 1257-58. The first question presented in the petition here mirrors the arguments made by LTV and North American in *Unity* and *ABC*. Robert has elected, for some reason, to relegate its own arguments in the courts below to second place and to feature instead arguments not previously advanced in this case but favored by LTV and North American.

such thing, and its decision is entirely consistent with *Eastern*. Before even getting to the merits, however, the argument is not properly before this Court, for at least two reasons.

a. First, the only argument that Robert properly preserved with respect to the constitutionality of the Coal Act under the Fifth Amendment is that the statute is defective because it allegedly interferes with the rights that Robert purportedly obtained as a result of the Settlement Agreement and Stipulated Order. Robert did not argue that the Coal Act as applied to it violated the Fifth Amendment on any other basis, nor did it assert a facial attack on the Coal Act's constitutionality under the Fifth Amendment. Now, for the first time, Robert contends that the Coal Act is "unconstitutional" as applied to it in light of a "legal test" that it claims to derive from the plurality and concurring opinions in *Eastern*. In support of this argument, Robert cites various NBCWA provisions that it never so much as mentioned in the courts below. (Pet. 2-3.) Robert cannot raise such an argument for the first time in its petition when it never before articulated the claim. Moreover, nowhere in its Fifth Amendment argument in this Court does Robert even mention the Settlement Agreement and Stipulated Order that formed the exclusive foundation for its Takings and Due Process Clause arguments in the district court and in the court of appeals. Robert thus has abandoned the only Fifth Amendment argument that it actually made in the courts below.

b. Second, Robert cannot pin its Takings Clause claim on this Court's decision in *Eastern* because Robert itself expressly disclaimed reliance on that decision in the court of appeals, acknowledging that:

> *Eastern* is factually distinguishable since it involved the Combined Fund [as opposed to the 1992 Plan]. Moreover, Eastern had not been a signatory to an

> NBCWA since 1964 [as compared to Robert, which had signed the 1974, 1978, and 1981 NBCWAs].

(Brief of Appellants at 32.) Nor can Robert tie its due process claim to the *Eastern* decision, because it did not even suggest in the court of appeals that *Eastern* had any significance at all to its due process claims. Indeed, Robert did not mention *Eastern* even once in its reply brief before the court of appeals. Robert cannot argue for the first time in this Court that *Eastern* controls this case, when it conceded in the court of appeals that *Eastern* does not control this case.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH *EASTERN ENTERPRISES*

Even if Robert's first question were properly before this Court, it provides no basis for review. Robert's argument that the court of appeals improperly refused to follow *Eastern* consists of three parts. First, Robert attempts to cobble together from the plurality and concurring opinions a "holding" of *Eastern* that, Robert claims, demonstrates that the Coal Act is unconstitutional as applied to it. (Pet. 11-13.) Second, Robert argues that the court of appeals refused to follow this purported "holding." (Pet. 13-15.) Finally, Robert struggles to manufacture a circuit conflict. (Pet. 15-16.) Each portion of Robert's argument is significantly flawed.

a. In *Eastern*, a sharply divided Court held that the Coal Act was unconstitutional as applied to the petitioner there. The plurality concluded that the Coal Act should be reviewed under the Takings Clause, and that it effected an unconstitutional taking as applied to Eastern Enterprises. 118 S. Ct. at 2146-53 (plurality). Justice Kennedy dissented from the plurality's conclusion that the Takings Clause applied, but concluded that, as applied to Eastern, the Coal Act violated the Due Process Clause. *Id.* at 2154-60 (Kennedy, J., dissenting in part and con-

curring in the judgment). The four dissenting Justices agreed with Justice Kennedy that the Coal Act should be analyzed under the Due Process Clause, but concluded that it did not violate due process principles. *Id.* at 2161-68 (Breyer, J., dissenting). At the same time, although the four Justices in the plurality declined to reach the issue, they expressed serious misgivings "about using the Due Process Clause to invalidate economic legislation." *Id.* at 2153 (plurality).

Although Robert acknowledges, as it must, that there was no opinion for the Court in *Eastern*, it nevertheless contends that this Court "established a general framework" and that Justice Kennedy and the plurality endorsed the "same legal test" for determining when a statute is unconstitutionally retroactive. (Pet. 11.) Applying this "legal test" to itself, Robert concludes that the Coal Act is "plainly unconstitutional" as applied to it. (Pet. 13 n.7.) This reasoning is faulty for several reasons.

To begin with, neither the plurality opinion nor the concurring opinion purported to create any new "legal test" or "framework" for determining whether economic legislation such as the Coal Act is "unconstitutional." Instead, they applied well-established, but different, constitutional principles to the specific case before the Court. Applying "the three factors that traditionally have informed our regulatory takings analysis," the plurality concluded that the Coal Act violated the Takings Clause as applied to the petitioner. 118 S. Ct. at 2149 (plurality). Justice Kennedy rejected the plurality's reliance on the Takings Clause but decided that the Coal Act as applied to Eastern violated "accepted principles" of this Court's due process jurisprudence. *Id.* at 2158 (Kennedy, J., dissenting in part and concurring in the judgment).

Robert dismisses the disagreement between the plurality and concurring opinions as a mere "theoretical question"

and declares that the plurality and Justice Kennedy were "in complete agreement" as to the "controlling Fifth Amendment retroactivity principles." (Pet. 11.) Studiously avoiding any argument addressed to either the Takings Clause or the Due Process Clause, Robert instead amalgamates the two distinct concepts and simply asserts that its "legal test" demonstrates that the Coal Act is in some generalized way "unconstitutional" as applied. (Pet. 13 n.7.)

But this is not the way courts determine the validity of statutes. The "common legal principles" that Robert purports to extract from the plurality and concurring opinions in *Eastern* have no independent constitutional status; there is no constitutional right, for example, to be free from retroactive statutes or from the imposition of "substantial" liability. Nor is there any basis for Robert's apparent belief that Congress may only enact legislation that imposes obligations that mimic promises already made in contracts. *See Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986) ("contracts, however express, cannot fetter the constitutional authority of Congress") (quoting *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-08 (1935)). Indeed, if there were any such requirement that legislation be duplicative of contractual promises, there would be little impetus to enact legislation.

For this very reason, the Third Circuit in *Unity* recently rejected an identical argument offered by LTV and North American as *amici* in that case:

> *Amici,* other former coal companies, submit that the holding of *Eastern* is that employee benefits funding legislation is unconstitutional if it imposes substantial retroactive liability on selected employers, and if that liability is unrelated to injuries caused or promises made by those employers. While this may be reasonably accurate in a general sense, it does not pro-

> vide guidance for determining how substantial is too substantial or how tight the fit between parties' past acts and the liability imposed on them must be. *Nor does it help define an intersection between substantive due process and takings law, as the word "unconstitutional" is here being used to cover, if not a multitude of sins, at least two.*

Unity, 1999 WL 167765 at *9 (emphasis added). The D.C. Circuit in *ABC* similarly rejected the claim that *Eastern* requires that the Coal Act be held generally "unconstitutional" on the basis of this extra-constitutional "legal test":

> We begin our analysis with a bedrock principle of constitutional adjudication—a principle which appellant either does not accept or is attempting to obscure. The Constitution prohibits certain governmental action through specific clauses—clauses that, with Supreme Court interpretation, have given rise to various and sometimes rather complex doctrines of constitutional law. *Courts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted under specific constitutional clauses.* Appellant's supplemental brief ignores this notion and asserts that, because the Coal Act was held "unconstitutional" in *Eastern Enterprises,* it must be "unconstitutional" here too, supported by an analysis that, so far as we can tell, tracks the three-factor "test" ordinarily used to evaluate challenges under the Takings Clause of the Fifth Amendment. . . . *We certainly will not apply a takings analysis to resolve a due process challenge or engage in a free-wheeling, non-textual examination of the "constitutionality" of the Coal Act.*

ABC, 156 F.3d at 1253-54 (emphasis added).

By failing to demonstrate—or even to argue—that the Coal Act violates its rights under the Due Process Clause or the Takings Clause, Robert attempts to elevate its purported "legal test" to constitutional status and to obscure the "bedrock principle" that laws are unconstitutional only if they violate a specific clause of the Constitution. Robert's strange approach has properly been rejected by both courts of appeals that have considered post-*Eastern* challenges to the Coal Act, and it does not warrant review here.

b. Robert errs not only in its use of *Eastern* but also in its characterization of what the court of appeals in this case held. Because the court of appeals cited its own earlier decision in *ABC*, Robert contends that the decision here depended on *ABC*. Robert then attacks *ABC* (and, indirectly, the decision below) for insufficient fidelity to *Eastern*, because *ABC* did not adopt Robert's purported "legal test." (Pet. 10.) Robert is wrong, both in its characterization of the decision below and in its attack on *ABC*.

In the first place, Robert's argument is but a straw man, because the court of appeals' decision in this case did not depend on *ABC*. The court explicitly ordered "that the judgment . . . be affirmed substantially for the reasons stated in the district court's memorandum opinion of November 17, 1997." (Pet. App. 1a.) The district court's opinion was issued some ten months *before* the D.C. Circuit's decision in *ABC* and could not possibly have relied on it. When the court of appeals affirmed "substantially for the reasons stated" by the district court, it too could not have been relying on *ABC*. The court of appeals cited *ABC*'s rejection of a due process challenge to the Coal Act only as "further support for the district court's holding" with respect to Robert's due process claim. (Pet. App. 2a.)

Moreover, even if the court of appeals in this case had relied on *ABC*, Robert's argument distorts the plain meaning of the *ABC* decision. Contrary to Robert's suggestion, the *ABC* court did not hold that *Eastern* was of no precedential value. To be sure, the court of appeals stated that "the only binding aspect of *Eastern Enterprises* is its specific result—holding the Coal Act unconstitutional as applied to Eastern Enterprises." *ABC*, 156 F.3d at 1255. Taken in context, the court of appeals clearly meant that the result in *Eastern* is controlling only in cases involving identically-situated coal companies that did not sign the 1974 and later NBCWAs. *Unity*, 1999 WL 167765 at *9 (citing *ABC*). The members of the appellant association in *ABC* were not identically-situated because, unlike Eastern, they remained in the coal business and signed both the 1974 and 1978 NBCWAs. *ABC*, 156 F.3d at 1256. Likewise, the Third Circuit concluded that *Eastern* did not control the outcome in *Unity* because appellants there (or their related persons) had signed the 1974, 1978, and 1981 NBCWAs. *Unity*, 1999 WL 167765 at *4. Robert is also not identically-situated to Eastern because it remained in the coal industry until 1984 and signed the 1974, 1978, and 1981 NBCWAs. As we discuss in detail below, these differences are significant under the various opinions in *Eastern* and distinguish this case from the circumstances addressed there. Moreover, *Eastern* considered only one piece of the funding mechanism for the Combined Fund rather than the different funding mechanism for the 1992 Plan at issue here. *Eastern*, 118 S. Ct. at 2142 n.2; *see also In re Olga Coal Co.*, 159 F.3d 62, 64 n.3 (2d Cir. 1998) ("Because *Eastern Enters.* was unconcerned with § 9712 . . . it does not affect our decision."). Robert fully acknowledged these distinctions in the court of appeals.

In its effort to demonstrate some error justifying this Court's attention, Robert engages in a detailed critique of

the court of appeals' application—not in this case, but in *ABC*—of this Court's decision in *Marks v. United States*, 430 U.S. 188 (1977). (Pet. 13.) Apart from the incongruity of Robert's use of its petition to attack the court of appeals' reasoning in a different case (in which the appellant did not seek certiorari), Robert's criticisms are unjustified. *Marks* states that, where there is no opinion for the Court, the holding of a case may be viewed as "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotation and citation omitted). But this approach is feasible only where "one opinion can be meaningfully regarded as 'narrower' than another—only where one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 778 (D.C. Cir. 1991) (en banc); *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994). Where the various opinions adopt distinct approaches and none can be said to be a subset of another, "no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the Court." *Id.* at 1058; *see also King*, 950 F.2d at 782 (same).

The court of appeals in *ABC* correctly observed that, "as should be obvious, Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis." *ABC*, 156 F.3d at 1255. The Third Circuit came to precisely the same conclusion. *Unity*, 1999 WL 167765 at *9. In such circumstances, only the result in the case before this Court is binding, and only in substantially-identical cases. *Id.*; *ABC*, 156 F.3d at 1254-55. This conclusion is entirely consistent with the plurality and concurring opinions in *Eastern*. *See* 118 S. Ct. at 2153-54 (plurality); *id.* at 2159 (Kennedy, J., dissenting in part and concurring in the judgment).

Finally, Robert is also wrong in its characterization of the court of appeals' reference to the undeniable fact that five Justices in *Eastern* concluded that the Coal Act should not be reviewed under the Takings Clause. The court of appeals did not declare itself bound by the concurrence and dissent; it simply observed that only four Justices in *Eastern* accepted the plurality's takings analysis. Since that view did not command a majority in this Court, it does not bind lower federal courts. This unremarkable conclusion hardly warrants further review.

c. Even if Robert had properly preserved and presented claims under the Due Process Clause and the Takings Clause rather than its generalized claim of "unconstitutionality," *Eastern* would not support Robert's position. The lynchpin of each opinion in *Eastern* was that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. *Eastern*, 118 S. Ct. at 2142-43 (plurality). Robert, by contrast, actively mined coal until 1984, and signed the 1974, 1978, and 1981 NBCWAs.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. The plurality stated, for example, that "[t]he 1974 NBCWA . . . amend[ed] previous medical benefits to provide a Health Services card for retired miners until their death, and to their widows until their death or remarriage." 118 S. Ct. at 2139-40. Similarly, the plurality distinguished the NBCWAs that Eastern had signed from those that came later:

> [W]hile Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor

> agreed to make contributions in connection with the Benefits Plans under the 1974, 1978, or subsequent NBCWA's. *It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.*

Id. at 2150 (emphasis added). The plurality then set forth its view of the relevant historical events and concluded that:

> There is no doubt that many coal miners sacrificed their health on behalf of this country's industrial development, *and we do not dispute that some members of the industry promised lifetime medical benefits to miners and their dependents during the 1970's.*

Id. at 2153 (emphasis added).

Justice Kennedy came to the same conclusion in his opinion, concluding that Eastern

> was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation *was created by promises and agreements made long after Eastern left the coal business.*

Id. at 2159 (emphasis added). Similarly, the four dissenting Justices in *Eastern* agreed that, while implicit promises were made, and legitimate expectations created, long before the 1974 NBCWA, those commitments were made explicit in the 1974 and later NBCWAs. *Id.* at 2161 (Stevens, J., dissenting) (stating that "their implicit agreement was made explicit in 1974").

If there can be said to be any common theme among the various opinions in *Eastern*, it is surely that the 1974, 1978, and subsequent NBCWAs created a reasonable expectation of lifetime health benefits: "[t]he clear implication of each opinion in *Eastern Enterprises* is that

employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." *ABC*, 156 F.3d at 1257; *Unity*, 1999 WL 167765 at *15-*19.

Robert signed the 1974, 1978, and 1981 NBCWAs and thus helped to foster an expectation of lifetime health coverage. In the courts below, Robert argued that the Settlement Agreement and Stipulated Order operated to cut off those legitimate expectations such that Robert should be allowed to dump its former employees into the 1992 Plan as "orphans," to receive benefits paid for by other coal operators that did not have the foresight to breach their contractual undertakings and then to engage in and settle litigation involving those obligations. In its petition, Robert has abandoned this argument in favor of its claim that it did not create any legitimate expectations to begin with because the NBCWAs it signed "explicitly limited" its commitment "to the respective term of each agreement" (Pet. 2)—an argument that Robert did not make below, that derives no support from any of the opinions in *Eastern*, and that reflects Robert's incorrect belief that congressional authority may be restricted by private contracts. *See Unity*, 1999 WL 167765 at *15. Whatever Robert's argument, however, each of the opinions in *Eastern* makes clear that the judgment there does not govern here.

d. Nor does the court of appeals' decision (to the extent it relies on the decision in *ABC*) conflict in any way with the views of the Fourth Circuit or of the United States. (Pet. 15.) As Robert recognizes, the Fourth Circuit in *Mary Helen Coal Corp. v. Hudson*, 1998 WL 708687 (4th Cir. Sept. 24, 1998) (table), faced a case that was "materially indistinguishable" from *Eastern*. (Pet. 15); *Mary Helen*, 1998 WL 708687 at **1. Like

Eastern—but unlike Robert—Mary Helen had terminated its coal mining operations in 1963 and the last NBCWA Mary Helen signed was in 1950. *Mary Helen Coal Corp. v. Hudson*, 976 F. Supp. 366, 369 (E.D. Va. 1997). Similarly, the court of appeals' decision here in no way conflicts with the fact that the Commissioner of Social Security has revoked the assignment of retirees of a number of identically-situated coal operators in the wake of *Eastern*, because Robert is admittedly not identically-situated. Robert's attempts to concoct a circuit conflict are without merit.

III. THE COURT OF APPEALS CORRECTLY HELD THAT THE COAL ACT DOES NOT VIOLATE SEPARATION-OF-POWERS PRINCIPLES

Relying on *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), Robert claims that the Coal Act "nullifies" the "final judgment" entered in the Kentucky litigation. (Pet. 16.) This argument rests entirely on an inflated and plainly incorrect view of the Settlement Agreement and Stipulated Order. It is fatally deficient for at least three reasons.

First, as the district court correctly held, the Settlement Agreement did no more than resolve a private contractual dispute between Robert and the UMWA. (Pet. App. 14a.) It released Robert from any contractual obligation to contribute to the UMWA 1950 and 1974 Benefit Plans. The Coal Act, in contrast, imposes a new, statutory obligation to contribute to the 1992 Plan. The Settlement Agreement did not purport to release Robert from future statutory obligations, nor could it have done so:

> Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights or property, but when contracts deal with a subject matter which lies within the control of

> Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them.

Norman v. Baltimore & Ohio R. Co., 294 U.S. 240, 307-08 (1935), quoted with approval in *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 642 (1993), and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986). That the Settlement Agreement was approved by a court does not change the result: "Immunity from federal regulation is not gained through forehanded contracts. Were it otherwise, the paramount powers of Congress could be nullified by 'prophetic discernment.' The rights acquired by judgments have no different standing." *Fleming v. Rhodes*, 331 U.S. 100, 107 (1947). The plurality in *Eastern* acknowledged this point, stating that "[o]ur opinions in [*Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976)], *Connolly*, and *Concrete Pipe*, make clear that Congress has considerable leeway to fashion economic legislation, including the power to affect contractual commitments between private parties." 118 S. Ct. at 2149. The Coal Act itself explicitly leaves undisturbed pre-Coal Act contractual obligations. *See* 26 U.S.C. § 9708.

Second, to the extent Robert has any rights as a result of the dismissal of the Kentucky litigation, those rights arise from the Settlement Agreement, and are limited by the terms thereof. The Kentucky litigation involved the UMWA's claim that Robert had breached its obligation to ensure continued health coverage for its retirees as required by the successorship clause in the 1981 and 1984 NBCWAs. (Pet. App. 42a.) That is the claim that Robert and the UMWA settled. The Settlement Agreement precluded any claim by the UMWA that Robert was responsible for paying for health benefits "arising

out of any Wage Agreement." (Pet. App. 44a.) The Coal Act does not disturb that outcome; it does not impose on Robert any obligation arising under the NBCWA or any other wage agreement. Rather, it imposes a new statutory obligation to pay for the benefits provided in the Coal Act. Nor does this case concern any claim by the UMWA; the claim is brought by the Trustees of one of the two new private plans created under the statute.

The Fourth Circuit rejected a similar claim to that presented by Robert in *Holland v. Keenan Trucking Co.*, 102 F.3d 736 (4th Cir. 1996). There, the appellants argued that a settlement between them and the trustees of the 1950 and 1974 UMWA Benefit Plans releasing the appellants from future liability to those plans, barred enforcement of the Coal Act as to them. *Id.* at 742. The court rejected the argument:

> As appellants concede, neither the 1992 Plan nor its Trustees were parties to this previous settlement. They therefore cannot be legally bound by its terms. Moreover, they could not possibly have been parties to the settlement because it was executed, and the action dismissed, before Congress had even passed the Coal Act. In addition, appellants provide no legal authority for the proposition that a contract between private parties can relieve one of them from statutory obligations such as those imposed by the Coal Act.

Id. Similarly here, the Trustees cannot be bound by the terms of the Settlement Agreement because they were not parties to it, and because the Settlement Agreement did not even purport to release Robert from future statutory obligations.

Third, the Stipulated Order in the Kentucky litigation by its terms did not grant Robert any rights at all. It simply dismissed the lawsuit with prejudice because the parties had reached a settlement. (Pet. App. 40a.)

Because the Stipulated Order did not grant any rights to Robert, the Coal Act cannot violate any such rights. In short, although Congress could not, consistent with this Court's decision in *Plaut*, order the Kentucky district court to revive the UMWA's 1988 lawsuit against Robert, the Coal Act does no such thing. The Coal Act does not order the re-opening of the Kentucky litigation or the revival of any claims by the UMWA, and it therefore implicates no separation-of-powers issue.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE SETTLORS AND TRUSTEES OF THE 1992 PLAN ARE NOT "OFFICERS OF THE UNITED STATES" FOR PURPOSES OF THE APPOINTMENTS CLAUSE OF THE CONSTITUTION

Robert's final argument likewise does not warrant further review. The claim that the Coal Act violates the Appointments Clause is premised on a non sequitur; because the Coal Act created the 1992 Plan and provided for the appointment of the Trustees, Robert asserts that the Settlors and Trustees of the 1992 Plan are *ipso facto* "Officers of the United States" and that every activity of the Trustees is necessarily an exercise of "governmental authority." Robert's conclusion does not follow.

This Court established long ago the contours of the term "Officers" as used in the Appointments Clause of the Constitution. An "office" is a "public station, or employment, conferred by the appointment of government." *United States v. Hartwell*, 73 U.S. 385, 393 (1867). That term "embraces the ideas of tenure, duration, emolument, and duties [that are] continuing and permanent, not occasional or temporary." *United States v. Germaine*, 99 U.S. 508, 511-12 (1878) (citing *Hartwell*, 73 U.S. at 393). Only appointees who exercise "significant authority pursuant to the laws of the United States" are "Officers of the United States" under the Appointments

Clause. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976). The Trustees are not "Officers" under these standards.

a. First, neither the Settlors (the UMWA and the Bituminous Coal Operators' Association, Inc. (*see* 26 U.S.C. §§ 9701(b)(2), 9712(a)(1)) nor the Trustees hold any "public station, or employment" conferred by the government. *Hartwell*, 73 U.S. at 393. The Coal Act expressly provides that the 1992 Plan is a "separate private plan." 26 U.S.C. § 9712(a)(1). It is also a plan within the definition of the Labor Management Relations Act of 1947 and an "employee welfare benefit plan" and a "multiemployer plan" within the meaning of ERISA. 26 U.S.C. § 9712(a)(2). Both of those statutes deal with private plans. The Settlors are a labor union and a multiemployer bargaining association, neither of which has any governmental role or connection. The Trustees are fiduciaries for the beneficiaries of the 1992 Plan, and they have the same responsibilities as the administrators of any private health benefit plan. *Cf. Communications Satellite Corporation*, 42 Op. Att'y. Gen. 165, 169-70 (1962) (incorporators and directors of federally-chartered corporation hold only a private station and thus are not "Officers" where they "have the same status and responsibilities as individuals serving on the board of an ordinary business corporation," and their obligation is the "furtherance of private interests"). The Trustees have no employment relationship with the government and are not compensated by the government. They thus hold not a public, but only a private station. *See Germaine*, 99 U.S. at 512 (emolument test not met where no "regular appropriation is made to pay" compensation); *cf. Hartwell*, 73 U.S. at 393 (compensation fixed by law).

b. Second, the Trustees do not have the sweeping authority attributed to them in the petition, and what authority they do have is not "governmental" authority. Robert asserts that the Coal Act provides the Trustees

"broad power to determine, assess, and collect monthly premiums from former NBCWA signatories," as well as the power to "determine whether an individual is eligible to receive benefits from the 1992 Plan." (Pet. 6, 22.) This is a serious overstatement. Congress itself, through the express terms of the Coal Act, determined what premiums should be assessed by the 1992 Plan and who is eligible for benefits. 26 U.S.C. § 9712(b)(2), (d)(1)-(3). The Trustees have no authority to assess premiums other than those prescribed by Congress or to expand eligibility beyond that intended by Congress.

Similarly, Robert states that the Trustees determine "what former NBCWA signatory is responsible for financing those benefits." (Pet. 6, 22.) This statement disregards the statute. Congress, not the Trustees, has decided that "[a]ny last signatory operator who is not a 1988 last signatory operator shall pay the monthly per beneficiary premium" for each beneficiary for whom that operator was the last coal industry employer. 26 U.S.C. § 9712 (d)(3). The Trustees have no power to deviate from that congressional mandate, nor do they. The Trustees simply perform the ministerial act of checking records to see which coal industry employer was the last signatory operator to have employed a particular retiree.

Robert also asserts that the Trustees exercise substantial authority to determine "fundamental design features of the 1992 Benefit Plan" (Pet. 22), apparently referring to such statutorily prescribed items as the development of managed care and cost containment rules, implementation of a prescription drug program, arranging for price discounts in exchange for patient volume and preferred provider status, and "selecting the most efficient physicians and state-of-the-art utilization management techniques . . . ." 26 U.S.C. § 9712(c)(2), (3). Although such activities are certainly important to the func-

tioning of any health plan, they assuredly are not "governmental" powers. To the contrary, they are no more than the administrative powers—common to any private health plan—to design rules and procedures to ensure the proper functioning of the plan. In the same way, the authority of the Settlors to appoint and remove Trustees and to provide for the "structure, administration, and terms" of the 1992 Plan (*see* 26 U.S.C. § 9712(a)(1)) is no different from the authority that a union and multiemployer bargaining group would exercise with respect to any multiemployer Taft-Hartley health benefit plan.

Nor is the Trustees' role in calculating 1992 Plan premiums in any way governmental. The Coal Act mandates that the 1992 Plan provide health benefits that are "substantially the same as" those provided under the 1950 and 1974 UMWA Benefit Plans as of January 1, 1992. 26 U.S.C. § 9712(c)(1). The Coal Act then provides that premiums shall be assessed against each last signatory operator based on the number of beneficiaries attributable to it, 26 U.S.C. § 9712(a)(1), (3), and that those premiums shall be subject to such adjustments as are necessary "to cover changes in the cost of providing benefits to eligible beneficiaries." 26 U.S.C. § 9712(d)(2)(B). In short, the function of the Trustees in calculating the amount of premiums involves little more than the arithmetical task of dividing the cost of benefits by the number of beneficiaries to determine a per beneficiary premium. It does not make the Trustees governmental officers.

The fact that the Trustees have the power to bring legal actions to enforce coal operators' obligations to the 1992 Plan does not undermine the conclusion that the Trustees are not "Officers" of the United States. Their power to sue is no different from the power of the settlors or trustees of any other private plan to sue to enforce the obligations imposed by that plan. *Buckley v. Valeo*, 424

U.S. 1 (1976), is not to the contrary. *Buckley* did not hold that the power to seek judicial relief automatically rendered the members of the Federal Election Commission "Officers." Rather, the Court said, the commissioners' "primary responsibility for conducting civil litigation in the courts of the United States *for vindicating public rights*" violated the Appointments Clause because such vindications of public rights may only be carried out by persons who are "Officers of the United States." *Id.* at 140 (emphasis added). Because the Trustees' power to seek judicial relief vindicates the *private* rights of the beneficiaries of the 1992 Plan and not the rights of the general public, the Trustees are not "Officers" within the meaning of the Appointments Clause.

The cases Robert cites in support of its position are plainly inapposite. In each case, the appointee had inherently governmental responsibilities, as contrasted with the purely private responsibilities of the Trustees. *See, e.g., Buckley*, 424 U.S. at 136-38 (enforcement of federal election laws); *Weiss v. United States*, 510 U.S. 163, 169 (1994) (military judges); *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 880-82 (1991) (special trial judges); *Morrison v. Olson*, 487 U.S. 654, 671-72 & n.12 (1988) (independent counsel); *Myers v. United States*, 272 U.S. 52, 173-74 (1926) (postmaster); *Ex Parte Siebold*, 100 U.S. 371, 397-98 (1880) (election supervisor); *Ex Parte Hennen*, 38 U.S. (13 Pet.) 225, 228 (1839) (district court clerk).

Robert's argument (Pet. 24) that assessments imposed by the Coal Act have been held to be "taxes" for purposes of the Bankruptcy Code is beside the point. Coal Act assessments are treated as "taxes" under the Bankruptcy Code, but they are taxes imposed by Congress, not the Trustees. To label the Trustees "Officers of the United States" simply because they collect the assessments would

similarly elevate to constitutional status the owner of every gas station that collects gasoline taxes, every employer who collects social security taxes, and anyone else who collects any tax imposed by Congress. Neither *Buckley* nor the Appointments Clause contemplates any such result.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN R. MOONEY
MARILYN L. BAKER
MOONEY, GREEN, BAKER, GIBSON & SAINDON, P.C.
700 14th Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 783-0010

PETER BUSCEMI
Counsel of Record
MITCHELL J. MATORIN
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

DAVID W. ALLEN
CHRISTOPHER CLARKE
Office of the General Counsel
UMWA HEALTH AND RETIREMENT FUNDS
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 895-3737

Counsel for Respondents UMWA 1992 Benefit Plan and its Trustees

April 19, 1999

Supreme Court, U.S.
FILED
APR 30 1999
CLERK

No. 98-1311

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT COAL COMPANY, *et al.*,
Petitioners,

vs.

MICHAEL HOLLAND, *et al.*,
Respondents,

and

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

GREGORY G. KATSAS
Counsel Of Record
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

ANTHONY J. POLITO
POLITO & SMOCK, P.C.
Four Gateway Center
Pittsburgh, PA 15222
(412) 394-3333

Counsel for Petitioners

1428

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Association of Bituminous Contractors v. Apfel, 156 F.3d 1246 (D.C. Cir. 1998) 1, 4, 5
Auffmordt v. Hedden, 137 U.S. 310 (1890) 8
Bostick Foundry v. Lindberg, 797 F.2d 280 (6th Cir. 1986) 7
Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) . 7, 8, 10
Eastern Enterprises v. Apfel, 118 S. Ct. 2131 (1998) 1, 2, 3, 4, 5, 6
Fleming v. Rhodes, 331 U.S. 100 (1947) 6
Holland v. High-Tech Colleries, Inc., 911 F. Supp. 1021 (N.D. W.Va. 1996) 9
Holland v. Keenan Trucking Co., 102 F.3d 736 (4th Cir.1996) 9
Interspiro USA, Inc. v. Figgie International Inc., 18 F.3d 927 (Fed. Cir. 1994) 7
Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) 4, 10
Lockheed Corp. v. Spink, 517 U.S. 882 (1996) 10
Marks v. United States, 430 U.S. 188 (1977) 1
Mary Helen Coal Corp. v. Hudson, 1998 WL 708687 (4th Cir. Sept. 24, 1998) 5
Morrison v. Olson, 487 U.S. 654 (1988) 8
Olga Coal Co. v. Connors, 159 F.3d 62 (2d Cir. 1998) 9
Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855) 6
Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 5, 6
In re Sunnyside Co., 146 F.3d 1273 (10th Cir. 1998) . . . 10
Unity Real Estate Co. v. Hudson, 1999 WL 167765 (3d Cir. Mar. 29, 1999) 2, 5

TABLE OF AUTHORITIES (cont'd)

Page

United States v. Germaine, 99 U.S. 508 (1878) 8
United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1867) 8

Statutes

12 U.S.C. § 1723a(a) 10
20 U.S.C. § 1087-2(d) 10
26 U.S.C. § 9712(b)(2) 6, 9
26 U.S.C. § 9712(c)(1) 6
26 U.S.C. § 9712(d) 9

United States Attorney General Opinions

11 Op. O.L.C. 73 (1987) 8
13 Op. O.L.C. 248 (1989) 8
14 Op. O.L.C. 94 (1990) 8
14 Op. O.L.C. 154 (1990) 8
1996 WL 876050 (O.L.C.) (May 7, 1996) 9

REPLY BRIEF FOR PETITIONERS

A. Fifth Amendment. In the petition for certiorari (at 10-16), we explained that this Court should grant review to determine whether *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), provides a binding legal framework for assessing the constitutionality of the Coal Act and other retroactive civil statutes, or whether, as the court of appeals has held, *Eastern Enterprises* established only a specific result in a single case. Respondents offer no sound reason for denying review.

1. The trustees contend (at 11-15, 16-17) that *Eastern Enterprises*, because it produced no majority opinion, established no binding legal principles. The government disagrees. It acknowledges (at 15-16) that there *is* a "*Marks* majority" (*see Marks v. United States*, 430 U.S. 188, 193 (1977)) for the proposition that "the crucial constitutional problem in *Eastern Enterprises* was the Coal Act's application to an operator that had never signed a wage agreement promising lifetime benefits."[1]

The trustees assert that a *Marks* majority is impossible because, regardless of the critical points of agreement between the *Eastern Enterprises* plurality and concurrence, those opinions analyzed the Coal Act under different constitutional provisions. Like the court of appeals, the trustees err in reasoning that to recognize the points of agreement would be to create "'free-wheeling'" constitutional claims. Opp. at 14, quoting *Association of Bituminous Contractors v. Apfel*, 156

---

[1] As explained in the petition for certiorari (at 11-13), a *Marks* majority is present because the *Eastern Enterprises* plurality and concurrence, although reasoning from different premises, *explicitly agreed* that retroactive economic legislation is unconstitutional if it imposes (1) a substantial liability (2) based on conduct far in the past and (3) unrelated to past promises made (4) or injuries caused by the burdened party. *See* 118 S. Ct. at 2149-53 (plurality); *id.* at 2158-60 (concurrence). As the government's formulation recognizes, the first, second, and fourth elements of this rule are obviously satisfied here, and the only open question involves application of the third.

F.3d 1246, 1253-54 (D.C. Cir. 1998) ("*ABC*"). Where four Justices would find an unconstitutional taking, and where at least one additional Justice would find a deprivation of due process, the appropriate result is not to uphold application of the statute in question (as the trustees' approach would require), but to invalidate that application (as this Court did in *Eastern Enterprises* itself). As explained in the petition (at 14), *Marks* plainly applies in these circumstances.

2. Within the legal framework established by *Eastern Enterprises*, the government attempts (at 2-3, 11, 15-16) to defend the decision below on the ground that the post-1974 NBCWAs, which Robert Coal signed, promised lifetime benefits. That is incorrect because, as explained in the petition (at 23), at least five different contractual provisions limited the promised benefits to the term of each agreement. In *Unity Real Estate Co. v. Hudson*, 1999 WL 167765, *15 (3d Cir. Mar. 29, 1999), the Third Circuit confirmed that the post-1974 NBCWAs did not "guarantee that the coal companies would pay for lifetime benefits." Concurring in the judgment, Judge Aldisert also stressed that the post-1974 NBCWAs "expressly limited all of the promised retiree health benefits to the term of each agreement," and that those agreements contain "no evidence of any 'promise' of lifetime benefits." *Id.* at *31.[2]

---

[2] With "substantial hesitation" (1999 WL 167765 at *1), the *Unity* court held that the Fifth Amendment does not bar application of the Coal Act to signatories of the post-1974 NBCWAs. The majority reasoned that, even though the post-1974 NBCWAs themselves made no promise of lifetime benefits, a "reasonable expectation" could have arisen from the parties' "course of conduct" in renewing successor agreements "for decades." *See id.* at *14-*16 & *18 n.9. That argument was rejected in *Eastern Enterprises*, where the NBCWAs at issue had been renewed for approximately two decades. *See* 118 S. Ct. at 2142-43 (plurality). The *Unity* concurrence reasoned that, although there was "no evidence of any 'promise' of lifetime benefits," the Coal Act could be sustained on the ground that the Coal Commission had unreasonably concluded otherwise. *See* 1999 WL 167765, at *30-*31. That argument also was rejected in

The trustees similarly contend (at 18-20) that *Eastern Enterprises* itself concluded that the post-1974 NBCWAs had promised lifetime benefits. Because Eastern last signed an NBCWA in 1964, *see* 118 S. Ct. at 2143 (plurality), this Court had no occasion to construe the post-1974 NBCWAs, and thus twice reserved the question whether the Coal Act is constitutional as applied to signatories of those agreements. *See id.* at 2142, 2153; *see also id.* at 2159 (concurrence). The trustees' quotation of passing references to the post-1974 NBCWAs simply confirms this Court's agnosticism on a question not before it. *See, e.g.*, 118 S. Ct. at 2150 (plurality) (post-1974 NBCWAs "first *suggest* an industry commitment to the funding of lifetime health benefits" (emphasis added)); *id.* at 2152 ("Not until 1974 . . . *could* lifetime medical benefits . . . have been viewed as promised." (emphasis added)).

3. The trustees assert various additional reasons why the Fifth Amendment question is not well presented. First, they contend (at 6-11) that petitioners failed to preserve their claim below. In the district court, however, petitioners based their Fifth Amendment claims not only on the Kentucky final judgment, as the trustees stress, but also on the absence of any prior promise of lifetime health benefits.[3] Petitioners renewed these

---

Eastern Enterprises, where the Coal Commission had unreasonably discerned a promise of lifetime benefits made "nearly 50 years ago" (*i.e.*, decades before 1974). *See* 118 S. Ct. at 2141 (plurality). Respondents make no attempt to defend either of these flawed rationales.

[3] *See, e.g.*, Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 32 (takings) ("Robert did not make any promise to provide lifetime health benefits to its retirees."); *id.* at 38 (due process) ("Robert Coal, without any legal or contractual obligation to do so, voluntarily provided health benefits to its retirees from 1988 until January 31, 1993.").

arguments in the court of appeals.[4] Moreover, even if petitioners had not raised these claims below, they would nonetheless be properly presented because both the district court (Pet. App. 16a-24a) and the court of appeals (Pet. App. 1a-3a) squarely addressed them. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

The trustees further contend (at 16) that the court of appeals' controlling opinion in *ABC* did not limit *Eastern Enterprises* to a "specific result" in a single case. In *ABC*, however, the court stated that "the only binding aspect of *Eastern Enterprises* is its specific result — holding the Coal Act unconstitutional as applied to Eastern Enterprises"; it further stated that "our basic inquiry in resolving [a] due process challenge remains the same after *Eastern Enterprises* as it was before"; and it upheld the Coal Act "for many of the same reasons that our sister circuits have articulated," citing as persuasive authority several pre-*Eastern* decisions upholding the Coal Act even as applied to signatories of pre-1974 NBCWAs, including the reversed First Circuit opinion in *Eastern Enterprises* itself. *See* 156 F.3d at 1255. The trustees cannot obscure *ABC's* evisceration of *Eastern Enterprises*.

The trustees also contend (at 15) that the decision below "did not depend on *ABC*." The court of appeals, however, twice cited *ABC* explicitly. Pet. App. 1a-3a. Moreover, that court's further citation of the district court's opinion confirms

---

[4] *See, e.g.*, Brief of Appellants at 31 (takings) ("In Robert Coal's situation, since it last signed the 1981 NBCWA, its obligation to provide retiree health benefits to its retirees expired in 1984."); *id.* at 35 (due process) ("Robert Coal, without any legal or contractual obligation to do so, voluntarily provided benefits to its retirees from 1988 until January 31, 1993."). Although the trustees assert (at 10) that petitioners "disclaimed reliance" on *Eastern Enterprises*, petitioners in fact argued that its rationale "is equally applicable to Robert Coal, which had no contractual obligation to provide retiree health benefits after 1984." *Id.* at 33.

that it does not view *Eastern Enterprises* as binding precedent, for the district court, like *ABC*, relied heavily on pre-*Eastern* decisions upholding the Coal Act even as applied to signatories of pre-1974 NBCWAs. Pet. App. 17a-23a.

4. Finally, the government (at 16 n.3) and the trustees (at 20-21) err in contending that the decision below can be reconciled with *Mary Helen Coal Corp. v. Hudson*, 1998 WL 708687 (4th Cir. Sept. 24, 1998). By applying *Eastern Enterprises* in a "materially indistinguishable" case (*id.* at *1), the Fourth Circuit necessarily rejected the D.C. Circuit's position that *Eastern Enterprises* governs only a single case. To be sure, *Mary Helen* raises the question whether pre- and post-1974 NBCWAs are "materially" distinguishable within the legal framework established by *Eastern Enterprises*. Because the post-1974 NBCWAs made no "'promise' of lifetime benefits," *see Unity*, 1999 WL 167765, at *31 (concurrence), that question must be answered in the negative. Applying *ABC*, however, the court of appeals never reached that question.

This Court should grant the petition for certiorari to determine whether *Eastern Enterprises* established legal principles applicable beyond the judgment in that case.

B. Separation of Powers. In the petition for certiorari (at 16-20), we explained that the Court should grant review to consider whether the separation-of-powers principles recognized in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), bar application of the Coal Act to nullify the Kentucky final judgment. Respondents oppose certiorari primarily based on the broad and dubious theories adopted below.

First, the government (at 17-18) and the trustees (at 22-23) contend that the decision below is correct because the statutory obligations retroactively imposed on Robert Coal are "new." However, respondents do not dispute that those obligations were explicitly "modeled on" (Pet. App. 14a) the expired NBCWAs directly at issue in the Kentucky litigation. Nor do

respondents dispute that the asserted constitutional justification for retroactive Coal Act liability is the alleged fit between the "new" statutory obligations and the "old" contractual obligations. *See, e.g., Eastern Enterprises*, 118 S. Ct. at 2152-53 (plurality). As explained in the petition (at 18-19), *Plaut* would be a dead letter if it were inapplicable in these circumstances.[5]

The trustees also suggest (at 21-22) that *Plaut* is inapplicable because the Kentucky judgment arose in a contract case. *Plaut*'s protection against legislative interference with final judgments, however, does not depend on the "source of the legal rule that produced the Article III judgments." 514 U.S. at 230. The trustees' authority establishes only that existing judgments do not prevent Congress from legislating *prospectively*. *See, e.g., Fleming v. Rhodes*, 331 U.S. 100, 107 (1947) (state-court judgment); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435-36 (1855). Those principles do not apply here, where the legislative interference is retroactive, and where Article III courts are at issue. *See Plaut*, 514 U.S. at 232 ("[t]hose cases distinguish themselves").

Finally, the trustees contend (at 5, 23-24) that *Plaut* is inapplicable because the extent of Robert's contractual liability was determined in a settlement agreement not explicitly incorporated into the Kentucky judgment. However, the judgment by its terms was "based on" the settlement agreement (Pet. App. 38a), and the Kentucky court expressly "approved" the settlement agreement (Pet. App. 40a) and made it an exhibit to the judgment (Pet. App. 40a-41a). That was more than enough to incorporate the settlement agreement into the judgment.

---

[5] The trustees contend (at 23) that *Plaut* cannot apply because only the UMWA, and not the 1992 Benefit Plan, was a party to the Kentucky litigation. The 1992 Benefit Plan is, however, a successor in interest to the funds that the UMWA had previously administered under the expired NBCWAs. *See* 26 U.S.C. § 9712(b)(2)(A) and (c)(1).

See, e.g., Interspiro USA, Inc. v. Figgie Int'l Inc., 18 F.3d 927, 930 (Fed. Cir. 1994) ("a court is not required to use explicit language or 'any magic form of words' to effect a valid incorporation of an agreement into an order"); *Bostick Foundry v. Lindberg*, 797 F.2d 280, 283 (6th Cir. 1986) (settlement agreement "incorporated in the district court record" is "as binding, conclusive, and final as if it had been incorporated into a judgment").[6]

The Court should grant certiorari to determine whether Congress can evade *Plaut* by creating "new" retroactive liabilities modeled on obligations previously extinguished, at least here, by the final judgment of an Article III court.

C. Appointments Clause. As explained in the petition for certiorari (at 20-24), this Court should grant review to determine whether the settlers and trustees of the 1992 Benefit Fund, who were not properly appointed under the Appointments Clause, but who nonetheless exercise significant authority pursuant to the Coal Act, are "Officers of the United States" for Appointments Clause purposes. Respondents do not dispute the importance of that question, but argue that the decisions below are correct on the merits.

1. The government (at 19-20) and the trustees (at 24-25) contend that only a permanent federal employee can be an "Officer of the United States." That argument is inconsistent with *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), which held that "*any* appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States'" subject to the Appointments Clause" (emphasis added), and with *Morrison v. Olson*, 487 U.S. 654, 671 n.12

---

[6] There is no material difference between the order at issue in *Interspiro*, which dismissed a case "pursuant to" a settlement agreement (18 F.3d at 930), and the Kentucky final judgment at issue here, which dismissed a case "based on" a settlement agreement (Pet. App. 38a).

(1988), which held that an independent counsel "*is* an 'Officer' of the United States, *not* an 'employee'" (emphases added). As explained in the petition (at 20-22), "Officer" status turns on the nature of powers exercised by the individual in question, not whether the individual is a federal employee.[7]

Contrary to its present position, the government for years maintained, in a series of formal opinions promulgated by the Office of Legal Counsel ("OLC"), that the Appointments Clause *does* apply to individuals, other than federal employees, who exercise "'significant authority pursuant to the laws of the United States.'" 13 Op. O.L.C. 248, 249 (1989) (Barr, AAG), quoting *Buckley*, 424 U.S. at 126.[8] Although the current administration recently overruled these decisions *en masse*, *see* 1996 WL 876050 at 109, 116 (O.L.C.) (May 7, 1996), even it

---

[7] The government's authority on this point (at 20) is inapposite. In *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393-94 (1867), the only question presented was whether permanent employment was sufficient (not necessary) to make the official in question an "Officer" for purposes of an embezzlement statute. In *United States v. Germaine*, 99 U.S. 508, 511-12 (1878), the individual in question was a surgeon who merely examined patients, and thus exercised no governmental power at all. Finally, in *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890), the individual in question was described as a "expert assistant" retained by tax officials to make a one-time appraisal of goods.

[8] *See, e.g.*, 14 Op. O.L.C. 154, 155 (1990) (Luttig, AAG) (Appointments Clause applies to private parties charged with determining applicability of federal statute); 14 Op. O.L.C. 94, 99 (1990) (federal contractors not appointed under Appointments Clause "may not determine the policy of the United States, or interpret and apply federal law in any way that binds the United States or affects the legal rights of third parties"); 13 Op. O.L.C. 207, 221 (1989) (Appointments Clause applies to *qui tam* relators) ("exercises of significant governmental power must be carried out by 'Officers of the United States,' duly appointed under the Appointments Clause"); 11 Op. O.L.C. 73, 74 (1987) (Congress cannot give state officials "not appointed in accordance with the Appointments Clause . . . the authority to waive a federal statute").

acknowledged that *Buckley* "used language" that "might suggest that the Appointments Clause applies to persons who, although they do not hold positions in the public service of the United States, exercise significant authority pursuant to federal law," *id.* at 29. The frequency with which this question has arisen, the controversy it has provoked within the executive branch, and the weight of executive precedent contrary to the government's current position all confirm that this Court should finally resolve the Appointments Clause question.

2. Alternatively, the trustees contend that they exercise no significant "governmental" authority in administering the 1992 Benefit Fund. First, the trustees argue (at 26, 27) that Congress itself made all significant decisions regarding eligibility for benefits and assessment of premiums. However, the Coal Act does *not* determine premium amounts, but makes former NBCWA signatories liable for "contribution requirements established in the 1992 UMWA Benefit Plan." 26 U.S.C. § 9712(d)(1). Moreover, although Congress established general parameters for determining eligibility (*id.* § 9712(b)(2)) and making assignments (*id.* § 9712(d)), these statutory terms are hardly self-executing, and substantial litigation has arisen from the trustees' interpretations and enforcement decisions.[9] In making those decisions, the trustees perform the quintessentially executive function of what *Buckley* described as "fleshing out the statute" (424 U.S. at 137).

Second, the trustees argue that their concededly broad powers to design the 1992 Benefit Plan (at 26-27) and litigate on its behalf (at 27-28) are no different from powers exercised

---

[9] *See, e.g., Olga Coal Co. v. Connors*, 159 F.3d 62, 66-67 (2d Cir. 1998) (whether § 9712(d)(2) incorporates "in business" requirement); *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 742-43 (4th Cir. 1996) (scope of "related person" liability under § 9712(d)(4)); *Holland v. High-Tech Colleries, Inc.*, 911 F. Supp. 1021, 1028-29 (N.D. W.Va. 1996) (definition of "last signatory operator" under § 9712(d)(3)).

by administrators of private welfare plans. When private administrators perform these tasks, however, they merely enforce voluntary obligations created with employer consent. *See, e.g., Lockheed Corp. v. Spink*, 517 U.S. 882, 886 (1996) ("Nothing in ERISA requires employers to establish employee benefit plans."). But when the trustees perform these tasks for the 1992 Benefit Plan, they determine the extent and enforcement of what the courts of appeals have correctly characterized as an "'involuntary'" scheme of federal taxation. *See In re Sunnyside Co.*, 146 F.3d 1273, 1276 (10th Cir. 1998) (citation omitted). Such enforcement is also a quintessentially executive power.[10]

Finally, the trustees (at 25) stress that the Coal Act describes the 1992 Benefit Plan as a "private plan." However, Congress cannot "make the final determination," for constitutional purposes, whether the powers at issue are "private" or "governmental" in nature. *See Lebron*, 513 U.S. at 392. For the reasons set forth above, they are obviously the latter.

CONCLUSION

The petition for a writ of certiorari should be granted.

---

[10] The government errs (at 20) in analogizing the 1992 Benefit Plan to "private corporations" such as the Federal National Mortgage Association ("FNMA") or the Student Loan Marketing Association ("SLMA"). Those entities engage in "cooperative agreements," such as renting property or selling debt, to advance their missions. 12 U.S.C. § 1723a(a) (FNMA); *see also* 20 U.S.C. § 1087-2(d) (SLMA). The trustees' attempt (at 28-29) to analogize themselves to "every gas station that collects gasoline taxes" is almost frivolous because, among other reasons, such collectors neither design the scheme of taxation at issue nor sue to enforce it.

Respectfully submitted,

GREGORY G. KATSAS
Counsel Of Record
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

ANTHONY J. POLITO
POLITO & SMOCK, P.C.
Four Gateway Center
Pittsburgh, PA 15222
(412) 394-3333

Counsel for Petitioners

April 1999